Unfitness to Plead, Insanity and the Mental Element in Crime

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**Introduction**

Whenever a person is found to be unfit to plead at the time of his or her trial, a jury must

determine whether s/he “did the act or made the omission charged as the offence”.[[2]](#footnote-2) Similarly,

when a court decides that a person was insane at the time of an offence being committed, part of

the jury’s task is to determine whether s/he “did the act or made the omission charged”.[[3]](#footnote-3) In either

case, if the jury is not so satisfied then it must return a verdict of acquittal.

An issue that has caused the courts some considerable concern recently is the extent to which, if

any, the mental element of the crime is relevant to the question of whether the accused “did the

act”. This article reviews the existing authority and concludes that, although the courts have

imposed a uniform test and may thus be said to have achieved consistency between the two

situations, this may result in considerable injustice in some cases.

**Trial of the facts when the accused is unfit to plead**

The test for unfitness is that set out in *R v Pritchard*[[4]](#footnote-4):

“... whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so

as to make a proper defence - to know that he might challenge any [jurors] to whom he may object

- and to comprehend the details of the evidence ... if you think that there is no certain mode of

communicating the details of the trial to the prisoner, so that he can clearly understand them, and

be able properly to make his defence to the charge, you ought to find that he is not of sane mind.

It is not enough that he may have a general capacity of communicating on ordinary matters.”[[5]](#footnote-5)

Unfitness to plead is not the same as insanity and it is clear that a person may be found to be unfit

to plead despite the fact that s/he does not satisfy the *M’Naughten* test for insanity.[[6]](#footnote-6) In 1960 Lord

Parker stated as follows in respect of the then statutory test for unfitness:

“[The test has] in many cases ... been construed as including persons who are not insane within the

M’Naughten Rules, but who by reason of some physical or mental condition, cannot follow the

proceedings at the trial and so cannot make a proper defence in those proceedings. A well-known

illustration is that of a deaf mute who is also unable to write or to use and understand sign

language.”[[7]](#footnote-7)

Once it has been established that the accused is unfit to plead,[[8]](#footnote-8) then the trial shall not proceed

further. However, the jury must determine “whether they are satisfied in respect of the count or

each of the counts on which the accused was to be or was being tried, that he did the act or made

the omission charged against him as the offence.”[[9]](#footnote-9) The legislation is silent on the burden of proof

but, given the adversarial nature of the proceedings and the issues to be ascertained, it seems clear

that the Crown would have the burden to the criminal standard.[[10]](#footnote-10)

If the jury is not satisfied that the accused did the act or made the omission they must return a

verdict of acquittal “as if on the count in question the trial had proceeded to a conclusion”[[11]](#footnote-11) and

the accused is discharged in the normal way. S/he will not be subject to any order of the criminal

court.[[12]](#footnote-12) This procedure, known as the trial of the facts, means that the unfit person is not at peril

of conviction but may still be acquitted if the jury is not convinced that s/he did the act or made

the omission charged.[[13]](#footnote-13)

If the jury decide that the accused did do the act or make the omission charged, then, although the

finding does not amount to a conviction, the trial judge has a range of disposal powers under the

1964 Act.[[14]](#footnote-14) In summary, s/he may impose a hospital admission order with or without restrictions

on discharge, a guardianship order, a supervision and treatment order or an order for absolute

discharge. This wide range of permissible disposals was introduced in 1991 in order to give the

judge an ability to make the disposal fit the risk posed by the accused[[15]](#footnote-15). One constraint on the trial

judge’s discretion is that where the offence charged is murder the only possible disposal is an

admission order with a restriction order without limit of time.[[16]](#footnote-16)

**Trial of the facts in insanity cases**

The procedure when insanity is claimed, is dealt with in section 2 of the Trial of Lunatics Act

1883.[[17]](#footnote-17) Section 2(2) provides as follows:

“Where in any indictment or information any act or omission is charged against any person as an

offence, and it is given in evidence on the trial of such person for that offence that he was insane...

at the time when the act was done or omission made, then, if it appears to the jury ... that he did

the act or made the omission charged, but was insane as aforesaid at the time when he did or made

the same, the jury shall return a special verdict that the accused is not guilty by reason of insanity.”

Despite the procedure being dictated by statute, insanity is a common law defence. The legal test

for insanity is set out in the *M’Naughten Rules*.[[18]](#footnote-18) The accused must prove[[19]](#footnote-19) that “at the time of the

committing of the act, [he was] labouring under such a defect of reason, from disease of the mind,

as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not

know he was doing what was wrong.”[[20]](#footnote-20)

There is no separate trial of the facts in cases where insanity is alleged. The decision-making process

is not as structured as that in the 1964 Act. In particular, there is no explicit requirement in the 1883

Act that a “normal” acquittal (as opposed to a special verdict) must follow if the jury are not

satisfied that that accused did the act or made the omission. Nevertheless, the wording of the

section seems to permit no other interpretation. The Court of Appeal has recently confirmed this

position:

“... those who are legally insane should not be deprived of their liberty by or, nowadays, made

subject to orders of the courts exercising criminal jurisdiction, unless they have behaved in a way

which constitutes the *actus reus* of a criminal offence...

... in our judgment the criminal law should distinguish between providing for the safety of the

public from those who are proved to have acted in a way which, but for their mental disability,

would have made them liable to be convicted and sentenced as criminals, and those whose minds,

however disturbed, have done nothing wrong.”[[21]](#footnote-21)

Given this it seems that the Crown bears the burden of proving that the accused did the act or

made the omission. There are thus four possible outcomes following the 1883 Act procedure: the

jury will find the accused guilty of the offence if they think s/he was guilty and was not insane;

they will find the accused not guilty if they decide that the accused was not insane but nevertheless

had not committed the crime; they will return the special verdict if they find that s/he did the act

or made the omission but was insane at the time; and finally if the jury find that the accused was

insane but are not satisfied to the criminal standard that s/he did the act or made the omission the

proper verdict is acquittal *simpliciter*.

If the jury does return the special verdict of not guilty by reason of insanity then the judge has the

same powers of disposal as noted above in relation to unfitness to plead.[[22]](#footnote-22)

In summary, the statutory phrase “did the act or made the omission” is of crucial importance in

respect of both unfitness to plead and insanity cases. It can make the difference between a bare

acquittal and a coercive order from a criminal court.

**The problem of the mental element**

The problem posed by the mental element is whether or not the Crown must prove that the

accused had the relevant *mens rea* in addition to committing the *actus reus* of the offence. Although

the wording used is the same for the test in unfitness cases as in insanity cases, it will be seen that

the two conditions give rise to very different considerations.

**Unfitness and the mental element**

Prior to the passage of the 1991 Act, the Butler Committee on Mentally Abnormal Offenders

reported and recommended the introduction of a trial of the facts procedure.[[23]](#footnote-23) It stated as follows:

“If the defendant is found to be under a disability, there should nevertheless be a trial of the facts to

the fullest extent possible having regard to the medical condition of the defendant. The object of

this proposal is primarily to enable the jury to return a verdict of not guilty where the evidence is not

sufficient for a conviction. ... the judge should direct the jury that if they are not satisfied that the

defendant did the act with the necessary mental state they must return a verdict of not guilty. The

issues to be established by the prosecution include the defendant’s state of mind. If this were not so,

the defendant would not obtain his verdict of not guilty even though there was insufficient evidence

that he had the requisite intention or other mental state for the crime - indeed, he would not obtain

it even though it was clear that the affair was an accident. This would clearly be unsatisfactory.”[[24]](#footnote-24)

Thus the report that initiated the debate about a trial of the facts procedure was firmly of the view

that an acquittal should follow in the absence of proof of *mens rea*. Even then the report recognised

that there was still a risk of injustice given the inability of the accused to defend him/herself:

“There is, of course, always the possibility that some explanation could have been given if the

defendant had been able to defend himself - an explanation that does not appear from the evidence

that is available; so there is the possibility of a wrong verdict. It is because of this possibility that we

are not proposing that this verdict should count as a conviction, nor that it should be followed by

punishment.”[[25]](#footnote-25)

Thus the risk of prejudice to an unfit accused was to be tackled first, by removing the risk and

consequences of conviction, and, second, on the trial of the facts, by requiring evidence that, but

for the inability of the accused to defend him/herself, the prosecution would have established guilt.

On the other hand if someone is unfit to plead in the sense that s/he is incapable of comprehending

the proceedings or evidence, or unable to communicate with his or her lawyers, it might seem

impracticable to expect the court to assess his or her *mens rea* at the time of the offence. S/he will

not be in a position to answer questions about it[[26]](#footnote-26) and will not be able to instruct lawyers to

adequately cross-examine Crown witnesses or call witnesses on his or her behalf. Moreover, the

unfit person no longer faces the risk of being convicted of an offence, so proof that he possessed

full criminal responsibiilty should no longer be an imperative.

This view is reflected in the reasoning of the government of the time during the passage of the Bill

that became the 1991 Act:

“It would be unrealistic and even contradictory where a person is unfit to be tried properly because

of his mental state, that the trial of the facts should nevertheless have to consider that very

aspect.”[[27]](#footnote-27)

The Home Office Circular accompanying the 1991 Act followed the view of the government in the

parliamentary debates. It stated that *mens rea* was a matter which it was “not intended should be

taken account of during the trial of the facts.”[[28]](#footnote-28)

**Insanity and the mental element**

The special verdict of insanity relates to the accused’s mental state at the time of the alleged

offence. It is recognition that a person may not be responsible for their actions due to their mental

condition, and thus leads to acquittal.[[29]](#footnote-29) Earlier judicial authority appears to be fairly clear that *mens*

*rea* is irrelevant to determining the “act” or “omission” in insanity cases. In *Felstead v R*[[30]](#footnote-30) Lord

Reading explained the special verdict as follows:

“... this verdict means that, upon the facts proved, the jury would have found him guilty of the

offence had it not been established to their satisfaction that he was at the time not responsible for

his actions, and therefore could not have acted with a ‘felonious’ or ‘malicious’ mind ... It is

obvious that if he was insane at the time of committing the act he could not have had a *mens rea*,

and his state of mind could not then have been that which is involved in the use of the term

‘feloniously’ or ‘maliciously’.”[[31]](#footnote-31)

The 1883 Act was not the first statute dealing with acquittal of insane defendants. The procedure

was first introduced in the Criminal Lunatics Act 1800. The Act provided that when a person was

acquitted following evidence of insanity, “the jury shall be required to find specially whether such

person was insane *at the time of the commission of such offence*, and to declare whether such

person was acquitted by them on account of such insanity; and if they shall find that such person

was insane *at the time of the committing such offence*, the court ... shall order such person to be

kept in strict custody...”. (Emphasis added.)

The 1883 Act continued the special verdict procedure but replaced, “commission of such offence”

with, “did the act or made the omission charged”. In *Attorney General’s Reference*

*(No 3 of 1998[[32]](#footnote-32)* Judge LJ referred to this as a “significant amendment” and went on: “The

difference is material. The original phrase ‘committed the offence’, appears to encompass the

relevant act, together with the necessary intent. By contrast, ‘act’ and ‘omission’ do not readily

extend to intention. This change of language, apparently quite deliberate, has been left unamended

for over a century and for all present purposes remains in force.”

In summary, we have seen that the amendments introduced by the 1991 Act required the

prosecution to prove that an accused who was unfit to be tried nevertheless did the act or made

the omission charged as the offence. In this it adopted the wording of the 1883 Act, which already

had an apparently settled meaning. However, the 1991 Act did not go further and explain what the

“act” or “omission” meant. Specifically, it did not say whether, in the context of unfitness as

opposed to insanity, the phrase was capable of importing the mental element of crime. Given that

it was preceded by a report that recommended just such an approach, it is not surprising that there

has been litigation.[[33]](#footnote-33) What is unexpected is the mess that the courts at all levels have managed to

make of the issue.

**Mens rea becomes relevant: *R v Egan***

*R v Egan[[34]](#footnote-34)* was the first case to consider the mental element in the context of the trial of the facts

under the new procedures inserted by the 1991 Act. E was charged with theft by snatching of a

woman’s handbag. He was found by the jury to be unfit to plead under section 4. There followed

a trial of the facts under section 4A at which E gave evidence denying he had been the snatcher.

The jury found that he “did the act” charged as theft and he was made subject of a hospital

admission order under section 5 of the 1964 Act. He appealed against the finding on the basis that

it was essential that the Crown prove all the ingredients of the offence of theft, including the

mental element, and that the trial judge had misdirected the jury in respect of dishonesty.

The Crown did not demur from the first proposition but contended that the judge’s direction on

dishonesty was acceptable. The Court of Appeal agreed with the parties in respect of the central

proposition, Ognall J. stating as follows:

“It will be apparent that the use of the phrase “the act” in the statutory provision to which we have

already referred and in other sections of both the 1964 and 1991 Criminal Procedure Act is to

avoid a person being afflicted with the stigma of a criminal conviction when at the time he or she

was in fact under a disability. It would be wrong in those circumstances, manifestly for such person

to be the subject of a criminal record for the commission of that offence. But that in no way

exonerates the Crown in an instance of this kind from proving that the defendant’s conduct

satisfied to the requisite extent all the ingredients of what otherwise, were it not for the disability,

would be properly characterised as an offence. Accordingly we are satisfied, and indeed both

counsel agree, that although the words “the act” are used in the relevant legislation, the phrase

means neither more nor less than proof of all the necessary ingredients of what otherwise would

be an offence, in this case theft.”[[35]](#footnote-35)

**Was the Court of Appeal in Egan correct?**

The decision of the court that “act” included *mens rea* received a mixed reception from

commentators. Professor JC Smith in his commentary in the Criminal Law Review observed as

follows:

“The court holds that the words in section 4A of the 1964 Act, ‘that he did the act or made the

omission charged against him as the offence’, mean all the ingredients of the offence, not just the

*actus reus*. ... The section could have been more clearly worded but there is no doubt that this is

the meaning intended.”[[36]](#footnote-36)

Mackay and Kearns commented on the requirement to prove *mens rea* as follows: “While this is

certainly at the expense of simplicity, it does have the merit of acting as a better protective device

for unfit defendants.”[[37]](#footnote-37)

On the other hand, the editors of *Archbold* 1999 edition criticised the decision as follows:

“... it is extremely doubtful that [*Egan*] is correct; and no argument to the contrary having been

addressed to the court on this point (counsel for the prosecution having apparently agreed with

this submission), its authoritative status must be limited. If it is correct, it would cut across the

plain purpose of the legislation; and would have results which could not possibly have been

intended. If, for example, a person who killed another was plainly suffering from such mental

illness as to make him both insane within the *M’Naghten Rules* and unfit to be tried, he would have

to be acquitted and discharged, even though he might be highly dangerous and likely to kill again

... The legislation is premised on the recognition that where the accused is unfit to be tried, it is

unreal to suppose that there can be a meaningful trial of the mental element of an offence.”[[38]](#footnote-38)

It is submitted that the decision in *Egan*, although not without its difficulties, did go a long way to

providing the correct balance between, on the one hand, protecting the person who has done no

wrong from interference with his or her liberty, and, on the other, protecting society from those

who can be proved to have acted in a dangerous manner.[[39]](#footnote-39) The main reason for this view is the

fundamental difference between unfitness to plead and insanity. The former focuses on the

condition of the accused at the time of the trial. The latter examines the accused’s mental state at

the time of the alleged offence.

A significant period of time often passes between commission of an offence and trial, particularly

where psychiatric reports have to be compiled. The important point for present purposes is that a

finding of unfitness to plead says nothing about the state of mind of the accused at the time of the

incident that led to the charge. He or she may have been perfectly healthy at the time of the offence

but may have degenerated, relapsed or suffered injury since. This explains the desire of the Butler

Committee to ensure that the trial of the facts explored all aspects of criminal liability, albeit within

the strictures imposed by the mental state of the accused at the time of the hearing.

The rationale for including the mental element in the trial of the facts is that, if the accused was

capable at the time of the offence of forming or not forming the appropriate *mens rea*, his or her

conduct should be judged in light of the standards we expect of ordinary people. To remove mens

rea from the equation would be to impose a lesser test for establishing responsibility by those who

are unfit to plead than exists for those who are fit to plead, despite the fact that at the time of the

offence they may have had the same mental capability. If the mental element is removed from the

test altogether, then even if there is reliable evidence as to the accused’s *mens rea* at the time of his

or her actions (or if reasonable inferences may be drawn) this will have to be ignored, leading to

potentially perverse results. Contrary to the suggestion in *Archbold*, it is submitted that it is often

possible to have a meaningful trial as to the accused’s mental state at the time of the *offence* despite

the fact that at the time of *trial* s/he is unfit to plead.

**Mental element ruled out in insanity cases: *Attorney General’s Reference***

In Attorney General’s Reference no.3 of 1998[[40]](#footnote-40) the accused was charged with aggravated burglary

and committed for trial to the Crown Court. Armed with a snooker cue he had forced entry into a

house and attacked the owner in the belief that he was Jesus Christ and that he had to escape from

evil.

The parties agreed that at the time of the incident the accused was legally insane. The issue for the

jury, therefore, was whether under section 2(1) of the Trial of Lunatics Act 1883 he “did the act or

made the omission” charged. The trial judge considered himself bound by the Court of Appeal

decision in *R v Egan* and thus required the Crown to prove all the relevant elements of the offence,

including *mens rea*. Psychiatric evidence presented at the hearing suggested that at the material

time, the accused was unable to form a criminal intent. The judge thus ruled that there was no

evidence of the required intent[[41]](#footnote-41) and directed the jury to acquit the defendant. Thus a potentially

highly dangerous man walked free from the court.[[42]](#footnote-42) The bizarre situation arose whereby a person

could avoid conviction due to his or her insanity and then use the insanity again to avoid even the

special verdict and secure a simple acquittal. Had it stood, the decision would have rendered the

special verdict otiose, as any finding of insanity would necessarily involve an acquittal.[[43]](#footnote-43)

The Court of Appeal unsurprisingly found that the judge was not bound to follow Egan. Judge LJ

analysed *Felstead v R*[[44]](#footnote-44) and concluded as follows:

“... nothing in the legislation suggests that if the jury has concluded that the defendant’s mental

state was such that, adapting Lord Diplock’s observation in *R v Sullivan*, his mental responsibility

for his crime was negatived, it should simultaneously consider whether the necessary *mens rea* has

also been proved. ... once it is decided that the defendant was indeed insane at the time of his

actions, in accordance with *Felstead v R*, *mens rea* becomes irrelevant.”[[45]](#footnote-45)

The court went on to note that there was no authority cited for the propositions of the court in Egan

and that no reference was made to the statutory history or framework in that case. Judge LJ said

that *Egan* “appears to have been decided per incuriam”[[46]](#footnote-46) and in any event had no application to

cases of insanity.[[47]](#footnote-47)

The Court of Appeal in *Attorney General’s Reference* was undoubtedly correct in its ruling relating

to insanity. Insanity means that the accused could not form the relevant *mens rea* at the time of the

offence and thus it is unsurprising (indeed essential) that *mens rea* is irrelevant to the determination

of whether s/he did the act or omission. Where the court fell into error, it is submitted, is in

thinking that the test for the act or omission in an unfitness case should be the same. It thought that

the two statutes (the 1893 Act and the 1964 Act, as amended) were “inextricably linked”. But are

they? Granted they both adopt the same language, but that cannot be decisive as there are

numerous instances of the courts giving identical statutory provisions different meanings in different

contexts.[[48]](#footnote-48) The contextual difference here is crucial. A court faced with a person who is unfit to

plead makes no finding as to whether s/he was capable of forming *mens rea* at the time of the

alleged offence. In the absence of evidence establishing the contrary, we must therefore assume

that s/he was so capable. Thus the justification, expressed in Felstead, for eschewing the need for

*mens rea* in a case of insanity is not present in a case of unfitness. If this is correct, then *Egan* was

not decided *per incuriam*, as *Felstead* dealt with fundamentally different subject matter.

**Defences and insanity**

Given that *mens rea* is irrelevant to whether an insane accused did the act or made the omission, to

what extent might s/he be permitted to argue that s/he has a defence? The Court of Appeal in *AG’s*

*Reference no. 3 of 1998* thought that there should be scope for the outright acquittal of insane

defendants in certain circumstances despite the fact that they have committed the act that has led

to the criminal charge. First it qualified the absence of a requirement for *mens rea* by saying that it

would be insufficient simply to show that the defendant *caused* the injury or other harm.

It must be caused in circumstances which, but for the insanity, would amount to an offence. Thus

the *actus reus* imported a sense of unlawfulness. Judge LJ said at page 47:

“So far as the criminal courts are concerned, we do not accept that public safety considerations

can properly be deployed to justify the making of orders against those who have done nothing

which can fairly be stigmatised as a criminal act.”

He thought that an insane accused ought nevertheless be able to argue that his or her conduct

occurred by way of self-defence or accident so as to make it lawful. If the jury agreed, it would not

find that the accused had done the (unlawful) act and would thus acquit rather than returning the

special verdict. His Lordship offered two examples where it would be unjust to expose the accused

to the consequences of the special verdict. The first was a mentally disabled person in a public

swimming pool who touches another swimmer in circumstances that may well have been accidental.

S/he ought to avoid a special verdict if charged with indecent assault. His Lordship contrasted this

with a situation where an apparently deliberate touching takes place in what appear to be indecent

circumstances. In such a case the insane accused should not be able to rely upon his or her own

mistaken perception, or lack of understanding, or indeed any defences arising from his or her own

state of mind.

The second example was an individual surrounded by a group of larger, aggressive and armed

youths who strikes out and causes one of them to fall and sustain a fatal head injury. His Lordship

thought that he should still be able to argue self-defence even if, due to his insanity, he believed that

the youths were a mob of devils attacking him. Even excluding his own damaged mental faculty at

the time, the jury might still conclude that although he caused death, his actions were not *unlawful*

and so did not amount to the *actus reus* of murder or manslaughter.

These examples show that for conduct to be the *actus reus* of an offence it must often be more than

a mere causa sine qua non. It assumes some unlawful circumstances, which are negatived by, for

example, self-defence or accident. One problem is that, although on one view self-defence relates

to the *actus reus* of offence, it is also clear that the need for self-defence and the requirement for

force to effect the defence are to be judged on the facts as the accused honestly believed them to

be.[[49]](#footnote-49) One issue is whether an accused’s insane mistaken belief as to the nature and extent of the

threat may be taken into account in determining whether the defence has been established. The

Court of Appeal seemed to think that the accused’s view would be discounted and the jury would

be invited to consider whether the circumstances, on an objective examination, would give rise to

the defence. This clearly twists the meaning of the defence as hitherto interpreted by the courts.

The swimming example would not appear to cater for the defendant who, due to his mental illness,

mistakenly believed that the victim was his own son and, had that been the case, the touching

would not be indecent. The touching would clearly be deliberate and the accused’s own

perceptions are to be ignored. The case also leaves unanswered other issues such as whether a

defence of duress of circumstances or necessity might be available to the defendant.

**Mental element ruled out in unfitness cases: *R v Antoine***

In *R v Antoine*[[50]](#footnote-50) the Court of Appeal and then the House of Lords had a further opportunity to

consider the decision in *Egan*, this time in the context of the trial of the facts. The appellant had

been charged with murder as a secondary party to a ritualistic killing. His co-accused was convicted

of manslaughter on the grounds of diminished responsibility following acceptance of his plea by the

Crown. The appellant was found to be unfit to plead and the trial judge ruled, following Egan, that

the Crown had the duty of proving both the *actus reus* and the *mens rea* of the crime of murder.

Secondly he ruled that the accused was not permitted to rely on the defence of diminished

responsibility in the course of the trial of the facts. The jury found that the accused had done the act

charged as murder for the purposes of section 4A and the judge therefore had to impose a hospital

admission order with restrictions on release without limitation of time. The accused appealed

against the finding[[51]](#footnote-51) asserting that he ought to have been able to raise diminished responsibility.

Both the Court of Appeal and the House of Lords rejected this contention on the grounds that the

defence of diminished responsibility applied only to a person who “but for this section would be

liable ... to be convicted of murder...”.[[52]](#footnote-52) Since a finding of unfitness prevents the trial from

proceeding,[[53]](#footnote-53) the accused is no longer liable to be “convicted of murder” and thus the section 2

defence is inapplicable. This swift reasoning was sufficient to deal with the certified question, but

both courts went on to express an opinion as to the correctness of the approach in Egan. Lord

Bingham CJ in the Court of Appeal noted that there was no challenge to the *Egan* principle in the

instant case, but he shared the doubts of the court in the *Attorney General’s Reference* case. He

said:

“If Parliament in enacting section 4A (2) of the 1964 Act intended to require the prosecution, when

proving that the defendant did the act or made the omission charged against him as the offence, to

establish all the ingredients of the offence including the *mens rea*, it is strange that language was

borrowed, almost unaltered, from section 2(1) of the 1883 Act which did not have that effect. It is

far from clear that Parliament ...intended to give effect to the recommendation of the Butler

Committee ... It seems to us at least arguable that the burden on the Crown under section 4A (2) is

no more and no less than in relation to insanity under section 2(1) of the 1883 Act.”[[54]](#footnote-54)

Lord Hutton (who gave the only speech) in the House of Lords devoted the bulk of his judgment

to what he called the wider question - whether *mens rea* had to be proved in the trial of the facts.

His Lordship surveyed the earlier litigation and suggested that *Egan* was inconsistent *with Attorney*

*General’s Reference* no. 3 of 1998 and should not be followed. The main reason for this was the

contrast between the words “committed the offence” in the 1800 Act and the words “did the act”

in the 1883 Act, which, he said, “points to the conclusion that the word ‘act’ does not include

intent.”[[55]](#footnote-55) He took support for this view from the “examination of the facts” procedure in

Scotland, the equivalent of section 4A.[[56]](#footnote-56) There the accused will be acquitted unless the Crown can

prove that s/he “did the act or made the omission constituting the offence”,[[57]](#footnote-57) wording that is

similar, though not the same, as in English law. However, his Lordship pointed out that if a Scottish

court is satisfied that the accused did the act but it appears that the accused was insane at the time

of doing it, the court must state whether the acquittal is on the ground of such insanity.[[58]](#footnote-58) This, he

thought, made clear that Parliament contemplated that a person may do the “act” but at the same

time be insane. Since insanity negatives *mens rea*, the “act” must relate only to the *actus reus*.

At first sight the logic of this argument is attractive. However, as the appellent retorted, a person

could be insane under the *M’Naughten* test but nevertheless still have *mens rea* - this would apply

where s/he was insane under the second head of the test so that s/he knew the nature and quality

of the act but did not know that it was wrong. As Professor JC Smith points out, “awareness of

‘wrongness’ is not an element in *mens rea*.”[[59]](#footnote-59) This would offer a possible explanation for the

Scottish provision while keeping alive the argument that the “act” includes *mens rea*. If insanity

does not always negative *mens rea* then there would be nothing illogical about the “act” in Scotland

encompassing the mental element while at the same time contemplating that it may be committed

by someone who was insane. Such an argument might have re-opened the whole issue of the

mental element in insanity cases and his Lordship swiftly rejected it. He said:

“My Lords, a person who kills when he is insane because he does not know that what he is doing

is wrong may have the intention to kill, but I consider that insanity under either limb of the

M’Naughten Rules negatives the mental responsibility of the defendant: see R v Sullivan [1983] 2

All ER 673 at 676 per Lord Diplock.”[[60]](#footnote-60)

No issue is taken with the accuracy of this statement, but it is submitted that it does undermine

the strength of the argument his Lordship based on the wording of the Scottish legislation. It can

be seen as parliamentary recognition of the difficulties inherent in the test for insanity.

His Lordship went on to criticise the recommendation of the Butler Committee, previously

quoted, as being “unrealistic and contradictory”. He was confident that in using the word “act”

and not the word “offence” Parliament had, “made it clear that the jury was not to consider the

mental ingredients of the offence.” He thought that a measure of protection was found in section

4 of the 1964 Act, which permits postponement of the question of fitness to be tried up to the

opening of the case for the defence. This permits the defence to test the prosecution evidence and

to ask for a finding of no case to answer if the Crown’s case does not disclose a prima facie case

to answer, including *mens rea*. It is submitted that in reality there is little scope on a submission of

no case to answer for the court to consider *mens rea*. It would be a rare instance indeed where the

Crown had secured a prima facie case on the *actus reus* but could not persuade the court that there

was a case to answer in respect of *mens rea*. Even in the absence of direct evidence of the accused’s

mental state the prosecution may ask the court to draw inferences as to *mens rea* from the evidence

that has been given of the accused’s conduct.

The central plank of his Lordship’s reasoning is that by using the word “act” rather than “offence”,

Parliament must be taken to have intended the same rules to apply in respect of unfitness as already

applied to insanity cases. It has already been suggested that this is defective, given the differences

in context and purpose of the two tests.[[61]](#footnote-61) A further reason is the difference in *definition* of the two

tests. As has been seen, a person may be unfit to plead even though s/he does not satisfy the

*M’Naughten* test. In other words, a person may be unfit to plead and sane at the same time. It is

acknowledged that such a situation would be rare, but it serves to illustrate the conceptual

difference between the tests. If such a person committed an offence and was later tried for it, s/he

would be unable to secure the special verdict and his or her *mens rea* would clearly be relevant to

the determination of guilt. That being so, why should unfitness at the time of trial prevent the

mental element of earlier conduct from being relevant to the trial of the facts?

**Unfitness and defences**

Lord Hutton dealt finally with the question of whether, assuming the trial of the facts relates only to

the *actus reus*, a person who is unfit should nonetheless be able to submit that s/he had an arguable

defence of accident, mistake or self-defence and should thus be acquitted. He recognised the

problem that such defences almost invariably involve some consideration of the mental state of the

accused. He resolved this by ruling that such a defence would be available but only if “objective”

evidence establishing it was available. He offered two examples. First a witness who saw a “victim”

attack the accused with a knife prior to the accused striking a fatal blow would be able to give

evidence to establish self-defence. Secondly, if a witness saw a woman sit down at a restaurant and

put her own bag next to another’s and then, on leaving, picked up the other’s the evidence would be

able to be given to establish mistake. His Lordship said the same principles would apply if the

defence wished to argue that the accused’s conduct was involuntary as a result of, say, a convulsion

- there would need to be evidence to establish the condition. This approach creates the same

problems as when insane defendants seek to rely on such defences. It necessitates a distortion of

the defence to remove the mental element of the accused. It is submitted that in cases of unfitness

it would be much better, and fairer, to use all available evidence, including that relating to the

personal perceptions of the defendant.

In summary, the House of Lords has in effect overruled the principle in Egan that the “act” in

section 4A includes consideration of the mental element. In its place the Court seems to have

imposed a similar requirement in relation to unfitness cases as the Court of Appeal in Attorney

General’s Reference no.3 of 1998 did for insanity. The defence may not argue absence of *mens rea*

at all; they may argue mistake, accident, self-defence or involuntariness but only if there is objective

evidence independent of the accused’s mental state to establish such defences. This article has

sought thus far to argue that the approach that has now been adopted is not necessary as a matter

of law and, more importantly, is wrong in principle. It is recognised that if the matter is to be

resolved it requires Parliamentary intervention. The remainder of this article will be devoted to

explaining why such intervention is thought to be necessary.

**Injustice caused by the current law**

Assume that A is charged with theft of a car from the forecourt of a showroom. He was arrested

in possession of the car shortly afterwards. After he was bailed, A met a mechanic from the

dealership and a confrontation ensued during which the mechanic suffered a broken jaw. A was

arrested again and during interview explained that the mechanic had been shouting abuse and had

reached into his tool bag. A said that he feared the mechanic was going to grab a tool to attack him

with and that he pushed him away in self-defence but that the mechanic fell against a wall. He was

charged with grievous bodily harm with intent under section 18 of the Offences against the Person

Act 1861. Unfortunately, following the incident, A was hit by a lorry and suffered significant brain

damage. When the trial was listed A was found to be unfit to plead.

At the trial of the facts the lawyer assigned to A wishes to argue that, although he appropriated the

dealership’s property, he did not act with intention to permanently deprive the owners and he did

not act dishonestly. Her argument is that A had been told by someone he took to be a salesman that

he could take the vehicle for a test drive. She wishes to adduce the testimony of A’s friend who

overheard the conversation with the fake salesman. According to the rule established by the House

of Lords in Antoine this evidence is inadmissible. Although it is “objective” evidence, it goes only to

whether or not A had the requisite intention and was dishonest. It thus enters the prohibited arena

of *mens rea*.

At the trial of the facts regarding the assault, A’s lawyer seeks to establish self-defence as permitted

in Antoine. However, given his unfitness, the only evidence she can point to is the coherent account

A offered in the police interview. This would not be allowed, as, although it relates to self-defence,

it is not “objective” and independent of the defendant’s state of mind.[[62]](#footnote-62)

In both instances there is reliable evidence suggesting that the accused may well not have

committed the offence. There was no issue relating to the mental capacity of the accused at the

time of the incidents. However, due to the artificial strictures of the Antoine test, the evidence must

be ignored and A would no doubt be found to have committed the “acts”.[[63]](#footnote-63) The important point is

that real injustice would have been done to A due to his inability to raise his own mental element.

Such an approach is understandable in cases of insanity at the time of the incident but it seems to be

wholly unjustified when the mental incapacity arises only as a bar to the presenting of an effective

defence.

A further point of interest arises from the scenario. The assault was initially charged as grievous

bodily harm with intent. This entails a specific intent in the accused to cause really serious harm.

The Crown, in reviewing the file will not maintain such a charge unless it is confident of being able

to persuade the jury that such intent was present. In A’s case, once he has been found unfit to

plead, all such considerations disappear and there is no incentive at all to reduce the charge.

This is due to the fact that the *actus reus* of causing grievous bodily harm with intent under section

18 is the same as inflicting grievous bodily harm under section 20. The difference lies in the

intention of the actor and this is reflected in the respective sentences - maximum life imprisonment

for section 18; 5 years for section 20. There is therefore less protection against over-charging for

defendants who are unfit to plead. So long as they are proved to have “done the act” they will be

dealt with as people who are more dangerous.

One could argue that this is not really a problem as there is no conviction and thus the maximum

sentence is irrelevant. The judge would be able to take all factors into account when deciding on

the appropriate disposal for a person who is found to have done the act. However, it is unrealistic

to suggest that judges are not influenced by the choice of charge.[[64]](#footnote-64) Moreover, if we assume for a

moment that the mechanic had died of his injuries an even greater power is given to the prosecutor

when deciding the charge. The *actus reus* of murder is the same as manslaughter so, accepting that

A did the act which caused the death, and discounting the mental element, the prosecutor would

know that a murder finding would be just as easy to secure as a manslaughter finding. However,

the consequences are hugely different for A. If the prosecutor chose to include murder on the

indictment then the judge would have no discretion but to impose a hospital order with restriction

on release without limit of time.[[65]](#footnote-65) If *mens rea* is irrelevant, justice would suggest that the

prosecutor should select a charge that was the lowest that the facts would allow. In the absence of

effective protection[[66]](#footnote-66) there is a risk that a person will face serious consequences due to arbitrary

decision-making by the prosecuting authorities.

**Conclusion - the way forward**

The problems highlighted in this paper are a result of the government’s desire for a simple

procedure for the trial of the facts, uncontaminated by consideration of mental element and

defences. This desire led the drafters to adopt the same language in the statute as already existed in

respect of the special verdict. It has become clear that the government’s view was over-simplistic

in that it failed to accommodate the elementary difference between unfitness to plead and insanity.

The courts have only now begun to grapple with the complexities of the trial of the facts and it

seems inevitable that there will be further high-level litigation on the relevance of the mental

element.[[67]](#footnote-67) The concerns go right to the root of criminal responsibility and the difference between

a prohibited act and a guilty mind. It is acknowledged that there is no easy solution. Lord Hutton

provided a potent illustration of the problems that would arise if *mens rea* always had to be proved

in the trial of the facts. A person who was insane at the time of an offence and who remained so

at the time of the trial, with a resultant finding of unfitness, would be able to lead evidence of his

or her insanity at the trial of the facts to show a lack of *mens rea*. S/he would have to be acquitted

and would thus be released, potentially putting the public at danger.[[68]](#footnote-68)

Ironically, in voicing these concerns his Lordship may have provided the key to the way forward.

What is required is a procedure that permits the mental element to be considered where it is

relevant but not where, due to insanity, it is inappropriate. The legislation ought therefore to permit

the jury to consider, as in Scotland, insanity within the context of the trial of the facts of an

accused who is unfit to plead. When an opportunity presents itself, Parliament ought to consider

amending the 1964 Act to make clear that in unfitness cases the Crown is required to prove the

*actus reus* and the *mens rea* and that an acquittal will follow if it cannot do so, but that, if it fails

due to the accused being insane at the time of the incident the jury will return the special verdict

of not guilty by reason of insanity. There would thus be three possible consequences following a

finding of unfitness. A bare acquittal would follow if the jury were not satisfied that the accused

committed all elements of the offence, including any requirement as to state of mind. A section 5

disposal would follow if s/he did commit all the elements of the offence. Finally, a special verdict

would be returned if the jury were not satisfied that the accused committed all the elements of the

offence by reason only of his or her insanity.

1. \* Kevin Kerrigan, Senior Lecturer in Law, University of Northumbria. I am grateful to Professor R.D. Mackay and to John Horne for their very helpful comments on earlier drafts of this article. Remaining errors and omissions are my own responsibility. [↑](#footnote-ref-1)
2. Criminal Procedure (Insanity) Act 1964 (the 1964 Act) section 4A, as amended by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (the 1991 Act). [↑](#footnote-ref-2)
3. Trial of Lunatics Act 1883 (the 1883 Act) section 2(1), as amended by the 1964 Act. [↑](#footnote-ref-3)
4. (1836) 7 C & P 303 [↑](#footnote-ref-4)
5. Ibid, per Alderson B at pp.304-5. [↑](#footnote-ref-5)
6. R v Governor of HM Prison Stafford ex parte Emery [1909] 2KB 81. In that case the accused was deaf and was unable to read or write. Although he was not insane in the “general” sense, he was “incapable of ... understanding and following the proceedings by reason of his inability to communicate with others...” per Darling J at page 87. [↑](#footnote-ref-6)
7. R v Podola [1960] 1 QB 325 at page 353. [↑](#footnote-ref-7)
8. See the 1964 Act 1991 section 4 for the procedure to be adopted. See Archbold Criminal Pleading Evidence and

 Practice 2000 4-167-174; Blackstones Criminal Practice 2000 D 10.8. In R v O’Donnell [1996] 1 Cr.App.R. 121 the Court of Appeal provided detailed guidance on the procedure to be followed. [↑](#footnote-ref-8)
9. 1964 Act section 4A(2). [↑](#footnote-ref-9)
10. This is the view of the government in the circular that accompanied the Act: see HO Circular no. 93/1991 paras. 4(a) and 9. [↑](#footnote-ref-10)
11. Ibid. section 4A(4). [↑](#footnote-ref-11)
12. Obviously, there may still be civil admission procedures instigated under Part II of the Mental Health Act 1983. [↑](#footnote-ref-12)
13. For a useful discussion of the reforms see White, The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 [1992] Crim LR 4. [↑](#footnote-ref-13)
14. 1964 Act section 5, as substituted by the 1991 Act section 3. See also the 1991 Act section 5. [↑](#footnote-ref-14)
15. Prior to the 1991 Act the only permissible disposal was an admission order subject to a restriction order without limit of time. [↑](#footnote-ref-15)
16. 1991 Act Sch.1 section 2(2). [↑](#footnote-ref-16)
17. The special verdict was altered by the 1964 Act to become “not guilty by reason of insanity” rather than “guilty but

insane”. The 1991 Act required the evidence of 2 medical practitioners, one of whom was Mental Health Act approved before the special verdict could be returned. [↑](#footnote-ref-17)
18. M’Naughten’s Case (1843) 10 CL & F 200. Their Lordships’ answers are reproduced in Archbold 2000 17-79 - 17-82. [↑](#footnote-ref-18)
19. The accused bears the burden of proof (to the civil standard) - R v Smith (Oliver) (1910) 6 Cr App R 19. The Crown may also allege insanity in response to a defence of diminished responsibility in a murder charge - Criminal Procedure (Insanity) Act 1964, section 6 -

and if it does so, it bears the burden of proof to the criminal standard. [↑](#footnote-ref-19)
20. This is the classic exposition of the test for insanity. Despite its doubtful status as authority (the judgment did not arise out of a case but was a response to questions posed by parliament) It has been adopted and applied by the courts ever since. See R v Sullivan [1984] AC 156. [↑](#footnote-ref-20)
21. Attorney General’s Reference (No 3 of 1998) [1999] 3 All ER 40 per Judge LJ at pages 47-48. [↑](#footnote-ref-21)
22. 1964 Act section 5(1)(a). [↑](#footnote-ref-22)
23. Report of the Committee on Mentally Abnormal Offenders, 1975, Cmnd. 6244. [↑](#footnote-ref-23)
24. Ibid. paragraph 10.24. [↑](#footnote-ref-24)
25. Ibid. paragraph 10.25 [↑](#footnote-ref-25)
26. Lord Hutton in R v Antoine [2000] 2 All ER 208 at page 214 suggested that careful consideration should be

given to whether it is right to call a person to give evidence when s/he has been found to be unfit due to mental disability. [↑](#footnote-ref-26)
27. Hansard 186 HC (6th Series) col. 1280, 1 March 1991, per John Patten MP, minister of state at the Home Office. This statement would not be helpful to a court under the rule in Pepper v Hart [1992] 3 WLR 1032 due to the fact that the legislation was a Private Members Bill. [↑](#footnote-ref-27)
28. HO Circular 93/1991 paragraph 8. [↑](#footnote-ref-28)
29. As far back as 1739 Hawkins’ Pleas of the Crown asserted: “... those who are under a natural disability of distinguishing between good and evil, as ... ideots and lunaticks ... are not punishable by any criminal prosecution.” In R v Sullivan [1983] 2 All ER 673 Lord Diplock said, at page 676, that the test for insanity defined “the concept of mental disorders as negativing responsibility for crimes.” [↑](#footnote-ref-29)
30. [1914] AC 534. [↑](#footnote-ref-30)
31. Ibid. at page 542. [↑](#footnote-ref-31)
32. [1999] 3 All ER 40. [↑](#footnote-ref-32)
33. White op. cit. note 12 at pages 8-9 neatly anticipated the difficulties ahead. [↑](#footnote-ref-33)
34. [1998] 1 Cr App R 121; (1996) 35 BMLR 103. [↑](#footnote-ref-34)
35. [1998] 1 Cr App R 121 at pages 124-125. The Court upheld the appeal on the facts as it thought that an adequate direction on dishonesty had been given. [↑](#footnote-ref-35)
36. [1997] Crim LR 225 at page 226. [↑](#footnote-ref-36)
37. R D Mackay and G Kearns The Trial of the Facts and Unfitness to Plead [1997] Crim L R 644 at page 650. In addition, White op. cit. note 12 had advocated the approach of Egan shortly after the Act became law. [↑](#footnote-ref-37)
38. Archbold 1999 4-174. See also Criminal Law Week 1999/14/4: “[Egan] would seem unlikely to survive, as there seems to be no justification for giving the same expression different meanings in the two different statutes. This would be a welcome result for Egan represented a position which was a variance with the purpose of the legislation and was liable to lead to results which could not have been intended.” [↑](#footnote-ref-38)
39. It should be acknowledged at this stage that this view is not shared by the (at the latest count) eleven judges of

the Court of Appeal and House of Lords who have had cause to consider Egan. [↑](#footnote-ref-39)
40. [1999] 3 All ER 40. [↑](#footnote-ref-40)
41. The Crown had successfully applied to amend the indictment to include a count of affray but the judge thought that this failed for the same reasons as the aggravated burglary - lack of evidence of mens rea. [↑](#footnote-ref-41)
42. It is not known if he was subsequently dealt with under the civil procedures in the Mental Health Act 1983. [↑](#footnote-ref-42)
43. See the searing criticism of the trial judge’s error by Professor J.R. Spencer in [2000] C.L.J. 9. It is conceivable that a defendant who relied on the “wrongness” limb of the insanity test would still have the requisite mens rea in a trial of the facts. See the discussion at text and note 58, below. [↑](#footnote-ref-43)
44. Op. cit, note 29, above. [↑](#footnote-ref-44)
45. [1999] 3 All ER 40 at page 47. [↑](#footnote-ref-45)
46. The decision would be per incuriam if it was decided in ignorance of binding authority. In this case it was said to be the consequence of the failure of the court to consider Felstead. [↑](#footnote-ref-46)
47. [1999] 3 All ER 40 at page 48. [↑](#footnote-ref-47)
48. For example, the different way that recklessness is dealt with under the Criminal Damage Act 1971, section 1(1) (Caldwell recklessness) as opposed to the Sexual Offences Act 1956, section 1(2)(b) (Cunningham recklessness). [↑](#footnote-ref-48)
49. See Williams (Gladstone) [1987] 3 All ER 411 (CA) and Beckford v R [1988] AC 130 (PC). [↑](#footnote-ref-49)
50. [2000] 2 All ER 208 (HL); [1999] 3 WLR 1204 (CA). [↑](#footnote-ref-50)
51. The appeal was brought under sections 15 and 16 of the Criminal Appeal Act 1968, as amended. [↑](#footnote-ref-51)
52. Homicide Act 1957 section 2(3). [↑](#footnote-ref-52)
53. 1964 Act section 4A (2). [↑](#footnote-ref-53)
54. [1999] 3 WLR at page 1210 [↑](#footnote-ref-54)
55. [2000] 2 All ER 208 at page 218. [↑](#footnote-ref-55)
56. Criminal Procedure (Scotland) Act 1995, section 55. [↑](#footnote-ref-56)
57. Ibid. section 55(1)(a) and section 55(3). Although not relevant to his Lordship’s argument, the court must also be satisfied on the balance of probabilities that there are no grounds for acquitting the accused, thus importing consideration of the mental element. There is no equivalent in English law. [↑](#footnote-ref-57)
58. Ibid. section 55(4). [↑](#footnote-ref-58)
59. Smith and Hogan Criminal Law 9th Edition page 206. [↑](#footnote-ref-59)
60. [2000] 2 All ER 208 at page 220. [↑](#footnote-ref-60)
61. See text and note 47. [↑](#footnote-ref-61)
62. Thus the only permissible account relating to the assault would come from the mechanic, the alleged victim. [↑](#footnote-ref-62)
63. This assumes that the courts will not permit any further inroads into the Antoine rule than identified in the House of Lords case itself. There is likely to be extensive argument in future cases about the nature and extent of the exceptions that already exist. [↑](#footnote-ref-63)
64. Over-charging could have particularly serious consequences as there is no right of appeal against an order imposed following a trial of the facts. The order does not follow a conviction and thus may not be appealed under section 9 of the Criminal Appeal Act 1968. Section 15 of the 1968 Act contains a right of appeal against a finding of unfitness and also against a finding that the accused did the act. However, there is no power to appeal against a disposal once such a finding has been lawfully made. [↑](#footnote-ref-64)
65. Sch 1 s.2(2) Criminal Procedure (Insanity and Unfitness to plead) Act 1991. [↑](#footnote-ref-65)
66. Presumably some protection could be afforded by the discretion of a judge to stay prosecutions as an abuse of process. [↑](#footnote-ref-66)
67. Lord Hutton in Antoine also noted the potential difficulties if the defence sought to raise the defence of provocation on a section 4A hearing alleging the act of murder and that difficult questions could arise as to the meaning of the word “act” in relation to a person charged as a secondary party to murder where another person had carried out the actual killing. In neither situation did he feel it was necessary to offer a final opinion. [↑](#footnote-ref-67)
68. This example was also used by the editors of Archbold 1999 to criticise the decision in Egan. See text and note 37. [↑](#footnote-ref-68)