

Psychological and Psychiatric Evidence in Criminal Proceedings



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**Law
Commission**
Reforming the law

The Law Commission

Professor David Ormerod QC

Law Commissioner



Background: what is the Law Commission?

- ◆ A statutory, independent body created by the Law Commissions Act 1965.
- ◆ **Our role?**
 - ▢ to keep the law under review and to make recommendations to government for reform where it is needed.
- ◆ **Our aims?**
 - ▢ to ensure that the law is fair, modern, simple and as cost-effective as possible.



Law Commission work

- ◆ Insanity and unfitness to plead
- ◆ Commenced under 10th programme
- ◆ Extensive consultation to secure evidence
- ◆ Published:
 - Scoping paper to ascertain the priorities
 - Consultation Paper on Unfitness (2011)
 - Discussion Paper on Insanity (2013)
 - Issues Paper on Unfitness (2014)
 - Report on Fitness (2016)



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Unfitness to plead

From unfitness set in 1830s
to

Effective participation in 21st Century trial



The failings of the present regime

- ◆ Who is unfit?
 - Who decides?
 - What is the test to be applied?
- ◆ If “unfit” a trial of the facts
 - occurs Limited focus of inquiry
- ◆ Disposals
- ◆ Inapplicability in the magistrates’ and youth courts



Unfit?

Current law

- *Pritchard* test from 1836 - focuses on D's capacity
 - Too low a test based on understanding of proceedings
 - Inadequate attention on D's participation
- Judge alone decides on evidence from **psychiatrists**
 - Expensive reports not always from appropriate expert

Recommendations

- ♦ Removing D from the full trial should be the last resort.
 - Reasonable efforts to adjust trial proceedings to facilitate D's effective participation.
 - Allow for adjournment for upto 12m
 - Better training for members of the judiciary and legal practitioners
 - A statutory entitlement for Ds to have a registered intermediary
 - A test of D's **capacity to participate effectively in the proceedings** applied in the context of the particular proceedings
 - list relevant abilities sufficient to enable effective participation effectively in trial; and
 - identify decisions on key issues at trial D needs to make.



Trial of facts

Current Law

- If D is unfit question is whether jury sure D “did the act”
- Often it is the mental state that mattered – if the act and fault can be divorced at all
- Eg What if D is charged with theft?

Recommendations

- ◆ Alternative finding procedure” the jury need to be sure of the full crime committed by D
 - D may elect trial by judge alone
 - Verdicts of acquittal, proved and NGBRI available



Disposals

Current Law

- Disposals limited to hospitalization; supervision; absolute discharge
 - Not sufficiently flexible given the range of conditions involved
- Difficult to resume trial

Recommendation

- No full application to magistrates or youth courts
 - ▢ Disposals to include more suitable supervision
 - ◆ Constructive and restrictive requirements, 3 years
 - ▢ Greater powers to resume full trial prosecution where D has recovered



Application to the magistrates' and youth courts

◆ Current

- Unfitness to plead provisions do not apply in the magistrates' (including youth) courts.
- Section 37(3) MHA 1983: the magistrates can impose a hospital order/guardianship if satisfied D "did the act or made the omission", and has treatable "mental disorder" (s1 MHA 1983).
- Power to adjourn s11(1) PCC(S)A

Recommendation

- **Same test** of capacity for effective participation in trial and capacity to plead guilty as in the Crown Court.
- Capacity to be addressed **before venue is decided**, in cases where D has power to choose.
- Procedures similar to Crown Court, including **requirement for expert evidence**.
- Disposal range: hospital order (without restriction, but power to commit for restriction where defendant over 14 years), supervision order and absolute discharge.
- Mandatory training for all legal practitioners and members of the judiciary engaged in cases involving young Ds.



The timing

- ◆ Time is ripe for law reform in relation to mental health and criminal justice
- ◆ Significant public awareness
- ◆ Growing evidence base from studies
- ◆ Pressures on criminal justice system
- ◆ Prison population
- ◆ Roll out of Liaison and Diversion

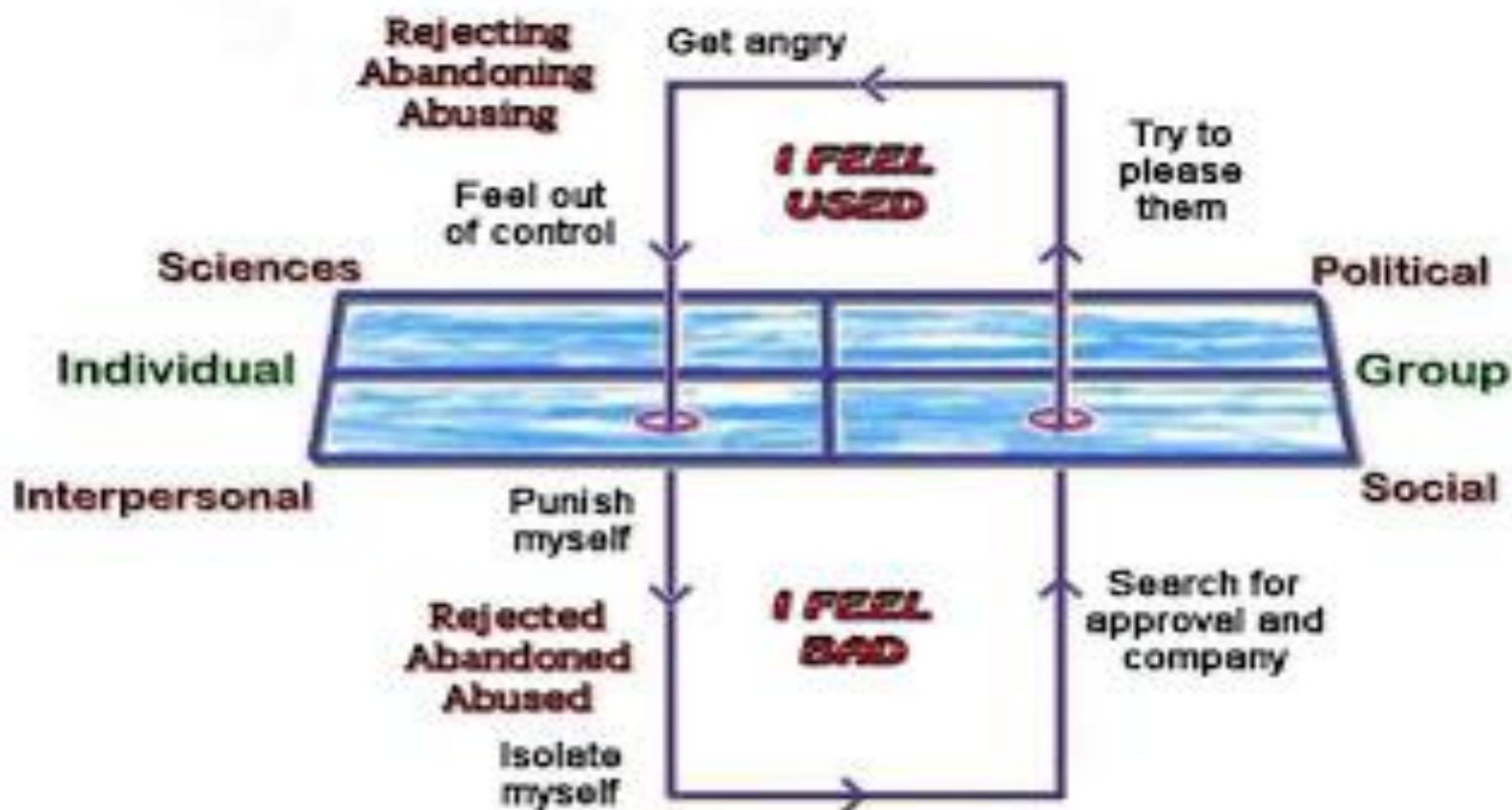


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END

FORMULATION TO OPINION: CAPTURING THE UNCERTAINTY OF PSYCHOLOGICAL EVIDENCE IN COURT

B M MCKENZIE 2018



TRANSLATION BETWEEN PROFESSIONS

- **The area I would like to address is the current difficulty of translation of often diffuse psychological finding into legally useful opinion that allows for judicial decision as to whether legal thresholds are met or not.**
- **It would seem to be helpful if legal and Judicial Colleagues understood our limitations and tasks.**



GIVING OPINION

- **As a forensic psychologist you are asked to give opinion on a range of matters with respect to the client;**
 - **Capacity – to make their own decisions, to give evidence, to stand trial, to consent to sexual activity.**
 - **Presence of disorders of mind, intellectual functioning or other pathologies.**
 - **Risk to public, known others, to self, and children in their care.**
 - **Treatment options and likelihood of change.**
- **This activity is largely uncontroversial as is within Forensic Psychology's designated area of expertise.**

PRACTISE DIRECTIONS

- The psychologist is given clear guidance in various documents such as Practise Directions 35 on experts and assessors; I would like to highlight the following
- **2.2** *Experts should assist the Court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate.*
- **2.3** *Experts should consider all material facts, including those which might detract from their opinions.*
- **2.4** *Experts should make it clear –*
 - *(a) when a question or issue falls outside their expertise; and*
 - *b) when they are not able to reach a definite opinion, for example because they have insufficient information.*

- *3.2(2) give details of any literature or other material which has been relied on in making the report;*
- *(6) where there is a range of opinion on the matters dealt with in the report –*
- *(a) summarise the range of opinions; and*
- *(b) give reasons for the expert's own opinion;*



THE TASK AND ITS PROBLEMS

- **As can be seen the forensic psychologist is asked for a balanced opinion within a context which does not demand absolute certainty but clarity and robustness.**
- **However the situation the psychologist finds himself is that few things are certain to the point a balanced opinion might very well seem entirely unconvincing to the Court. There seems number of reasons for this;**

1

- **There are very significant limitations in the assessment process. This is by definition time limited and client's presentations fluctuate. I was recently in a benefit determination tribunal where a man with a fifteen year history of delusional beliefs and self isolation was assessed for his PIP at the height of his recovery having been through secure hospitalisation and intensive supportive rehabilitation. His PIP was on this basis withdrawn. All attempts to convince to assessors that his presentation was open to fluctuation and not reliable fell on deaf ears.**

2

- **Practically the majority of assessments you undertake will fall on your assessment into a marginal zone. I have not seen any research on this matter but from own experience it is the rare instance that you find for example an individual with an IQ of say less than 50. When you do you find they have been a market trader for years and possess a driver's licence.**

3

- **Limitations in research data. Lets take reconviction rates, this only looks at the rate where evidence the matters reaches criminal threshold – there is a proportion who get to Court and evidence while strong is insufficient and a groups where evidence is present for further untoward behaviour but not at that threshold. We rarely get a clear sense of the size of**

4

- **Even in areas well researched, in fact the more researched an area the more clarity we have of limitations. For example studies of the well established risk assessment tools such as the HCR 20 suggests that 30 % will be wrongly categorised as either no risk or risk where none is present. While this is better than chance in areas of very high stakes it may not be sufficient to be solid enough for the Parole board.**

5

- **Psychology is an area of competing paradigms and paradigm shifts. An interesting example is the shift to the Power Threat Meaning Framework. Here classical diagnosis of mental health and personality disorder are eschewed. All individuals, including those 'well' and not offending are seen on a continuum with fluctuating capacity to show pathology. He or she should not be seen as having a mental disorder but a maladaptive survival strategy arising out of past trauma.**

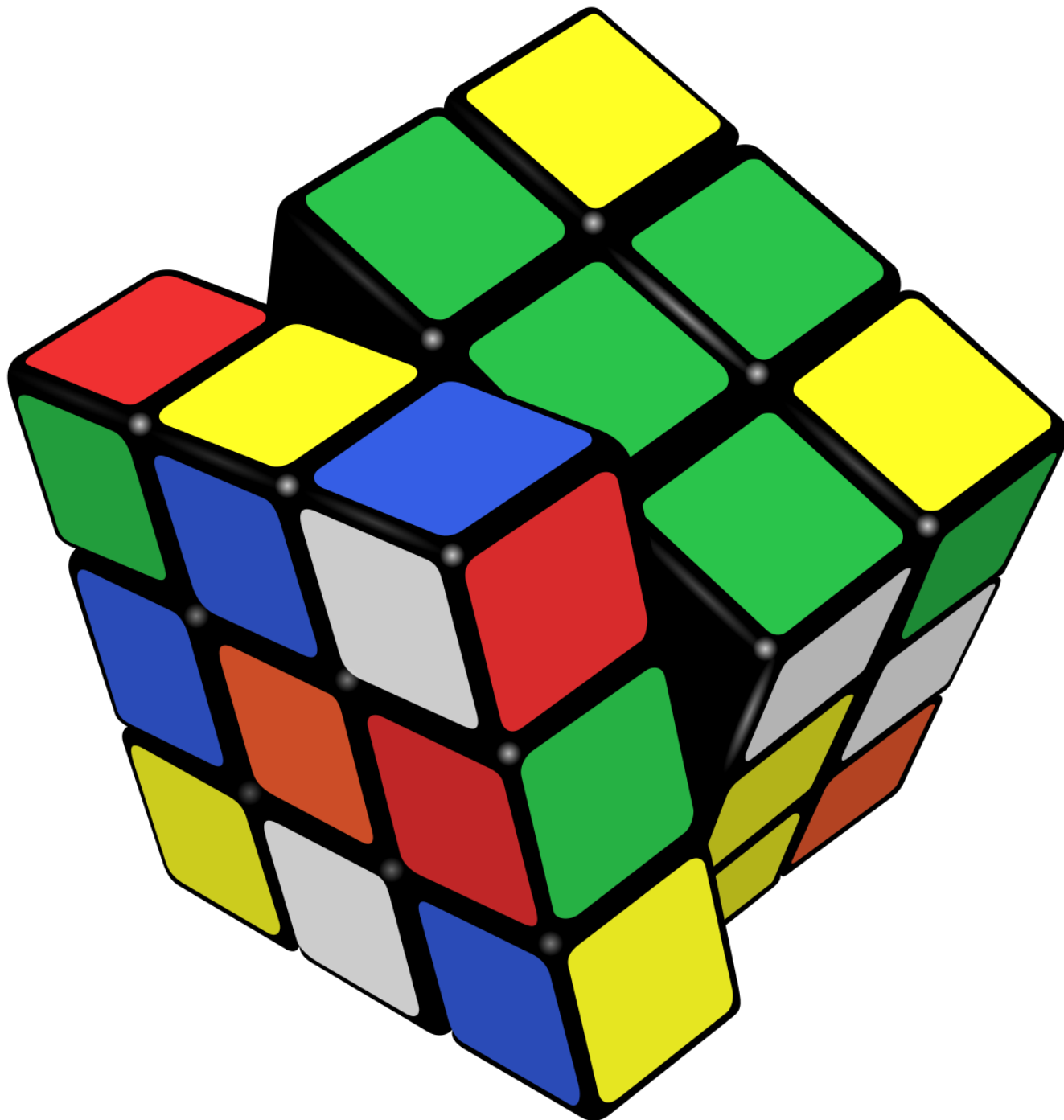
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- **We know that behaviours are multi determined; for example an individual's cognitive capacities may be undermined by anxiety producing disassociation, which may in turn be triggered by contextual features, not always present, but possibly present in Court.**

UNCERTAINTY PREVAILS

- **As can be seen from the above the forensic psychologist is almost always to come to conclusions from which the opinion will always contain a large element of uncertainty and almost inevitably admit of different views.**
- **Would this convince a Court?**
- **Probably not**





CONVINCING FORMULATION: THE WAY AHEAD?

- **Certain factors would seem helpful in this process;**
- **We know enough to suggest testing results, risk assessment tools, diagnosis are working short hand heuristics or descriptors and not convincing established explanatory phenomena.**
- **A more accurate approach is to provide a holistic formulation from which we derive predictions as to capacity, mental state, risk and treatment potential. The key foundation then becomes the robustness and defensibility of the psychological formulation rather than individual factors.**

COHERENCE OF FORMULATION VITAL

- **The ‘coherence index’ of the various factors emerging in the assessment drawn together by the formulation is the core indicator of reliability of your overall view. This is the key area to be tested and initially argued in court.**
- **Once the formulation is established then the degree of psychological disturbance this represents can be judged, both inherently and within differing contexts.**

GOOD INSTRUCTION

- **At this point the legal tests formulated in case law can be addressed. Here it is extremely helpful if instructions can be both precise and guidance given as what both exemplars discriminating presence of absence would be extremely helpful.**
- **We often have what appears to the psychologist rather arcane phrases – probably entirely clear to legal colleagues – but translation of these would be helpful.**

FORMULATION TO BEHAVIOUR FEED BACK

- The process of giving an Opinion should in itself test the Formulation, requiring development and modification.
- If it cannot sustain the opinion this is a clear measure of the assessments limitations should be reported on.

