
Para 15.10 In *Marcantonio* [2016] EWCA Crim 14, the Court of Appeal stated that, in applying the criteria set out in this numbered paragraph, the judge is required to undertake an assessment of D's capabilities in the context of the particular proceedings. That assessment, it said, should require the court to have regard to what that legal process will involve and what demands it will make on D. The Court continued (at [7]) that that assessment 'should be addressed not in the abstract but in the context of the particular case. The degree of complexity of different legal proceedings may vary considerably. Thus the court should consider, for example, the nature and complexity of the issues arising in the particular proceedings, the likely duration of the proceedings and the number of parties. There can be no legitimate reason for depriving a defendant of the right to stand trial on the basis that he lacks capacity to participate in some theoretical proceedings when he does not lack capacity to participate in the proceedings which he faces.'

In *Orr* [2016] EWCA Crim 889, the Court of Appeal held that the capacity to be cross-examined was part and parcel of D's ability to give evidence (referred to in the last bullet point in the first paragraph on p 601 of the text), and therefore that a defendant who had been fit to give evidence in chief could be unfit to plead if he became unfit to give evidence in cross-examination.

Paras 15.10 and 15.12 In *Orr*, above, where D, having given his evidence in chief had become unwell, and, the judge having adjourned the trial to enable D to be psychiatrically examined, two psychiatrists had assessed D as unfit to be cross-examined, the Court of Appeal held that, once the issue of fitness to plead had been raised, it had to be determined. If the judge then determined that D was no longer fully fit to participate in the trial, the procedure under the Criminal Procedure (Insanity) Act 1964, s 4A had to be followed. It was a mandatory requirement which could not be avoided by the exercise of the court's general discretion to order proceedings otherwise, however beneficial it might appear to be.

Para 15.14, n 39 Although it has not been overruled, *McKenzie* [2011] EWCA Crim 1550 is unlikely to be followed in the light of the Court of Appeal's decision in *AD* [2016] EWCA Crim 454 in a case involving a determination under the Criminal Procedure (Insanity) Act 1964, s 4A(2) where the wrong specification of the offence in the indictment is simply a drafting error and it is clear what the prosecution is alleging against D. In *AD*, D, as in *McKenzie*, was accused of sexual assaults on a male but as a result of a drafting error was charged in the indictment on counts charging the offences by reference to the Sexual Offences Act 1956, s 14 (indecent assault on a woman) rather than s 15 (indecent assault on a man). D was tried and convicted on these counts. The Court of Appeal held that the convictions were not unsafe. It held that there was undeniably a tension between *McKenzie* and the subsequent case of *Stocker* [2013] EWCA Crim 1993 which it followed. *Stocker* was another case where D had been convicted on an

indictment containing a count in which a simple drafting error had resulted in a reference to the wrong provision but this had not prevented D knowing the case he had to meet. The Court of Appeal, without reference to *McKenzie*, had held that the conviction was not unsafe. In following *Stocker*, and not following *McKenzie*, the Court of Appeal in *AD* stated (at [27]) that *McKenzie* 'has to be read in the light of the subsequent decision in *Stocker* and in any event was a case which involved a determination under s 4A(2) of the Criminal Procedure (Insanity) Act 1964'. Although the Court of Appeal distinguished *McKenzie* in this way, it is unlikely (as already indicated) that *McKenzie* would now be followed where a determination under s 4A(2) related to a count which, because of a simple drafting error, had referred to the wrong provision but this has not prevented it being clear what the prosecution is alleging against D.

Para 15.16 In *Marcantonio* above, the Court of Appeal thought, in an *obiter dictum*, that there was a strong case for a test of capacity to participate effectively in a trial and a test of capacity to plead guilty. It stated (at [8] and [9]):

> 'There will be cases in which the defendant would be unable to follow proceedings at trial or to give evidence but would not lack the decisional capacity necessary for entering a plea of guilty. We would question the desirability of denying such a defendant the option of pleading guilty Once it is established that a defendant who intends to plead guilty has the capacity to do so and that his plea is a sound basis for a safe conviction, it is difficult to see why he should be considered unfit to plead on the ground that he would be unable to understand a trial which will not take place or to give evidence in his defence when the evidence he would give, if called, is that he is guilty and he would not therefore be cross examined...
>
> We note that this issue is addressed by the Law Commission in its recent report on Unfitness to Plead where it recommends the introduction of a second test, one of capacity to plead guilty, for defendants who would otherwise lack the capacity to participate effectively in a trial. However, this issue was not fully argued before us and, as will become apparent, it is not necessary for us to decide it in these proceedings. Accordingly, we do not do so.'

***Para 15.40** In *Loake v Crown Prosecution Service* [2017] EWHC 2855 (Admin), the Divisional Court held that the defence of insanity under the *M'Naghten Rules* applies to all criminal offences. In reaching this conclusion, the Court analysed how the defence of insanity operates. It began by stating that at the heart of the rationale for the insanity defence is the principle that criminal punishment should only be imposed upon those who are responsible for their conduct. It continued (at [36], [39]-[41]):

> 'The defence of insanity operates so as to give effect to this principle, firstly by relieving the defendant of responsibility in cases where he did not know the nature and quality of his act. In modern terms, this simply means that the defendant literally "did not know what he was doing"…
>
> In virtually every case where the defendant proves that he did not know the nature and quality of his act at the time he performed it, then he will not be criminally responsible irrespective of the first limb of the *M'Naghten* test, because he will lack the *mens rea* for the alleged offence. … To that extent, insanity as it operates in that context adds little, in the sense that the defendant would fall to be acquitted of murder in any event by reason of lack of *mens rea* (although the effect of the special verdict might be that the disposal is different).
>
> It is not correct, however, simply to regard insanity reductively, as operating simply on the basis that someone who is suffering from a disease of the mind will *always* lack *mens rea* for the offence.
>
> It is possible for someone to have the full *mens rea* for a criminal offence whilst at the same time, because of a defect of reason arising from a disease of the mind, not know what he is doing is wrong.'

In concluding that that the defence of insanity is of general application, the Divisional Court held that the decision in *DPP v H* [1997] 1 WLR 1406, DC, should be regarded as misleading, and should not be followed. The Divisional Court also held that, to the extent that it supported the same proposition as in *DPP v H*, *Horseferry Road Magistrates' Court, ex p K* [1997] QB 23, DC (which the Court regarded as *obiter* on the particular point) should not be followed. Both cases were founded on the proposition that the defence of insanity is based on the absence of *mens re*a, whereas, as the Divisional Court explained the defence of insanity actually rests on a broader base than mere absence of *mens rea.*

***Para 15.126** The Court of Appeal in *Taj* [2018] EWCA Crim 1743 considered the words of the Court of Appeal in *Harris* [2013] EWCA Crim 223, set out on p 666 of the text. In *Taj*, D, who had abused drugs and alcohol from a young age, had alleged that he had acted under a material mistaken belief. D admitted that he had been drinking heavily during the two evenings before the incident. He also admitted that during the weeks leading up to the incident he had been habitually drinking to excess and using cocaine. He accepted that alcohol and cocaine could cause him to experience feelings of paranoia and that he had been paranoid on the day of the incident. There was no suggestion that he had taken any drugs or alcohol on the day of the incident. Psychiatric evidence suggested that D had been suffering from a drug-induced psychosis on the day of the incident, but that he displayed no evidence of an ongoing psychosis. D argued

that, because there was no suggestion that he had alcohol or drugs in his system at the time of the incident, he was not 'intoxicated'.

The Court of Appeal, applying *DPP v Majewski*, concluded that no distinction should be drawn between a defendant whose mistaken belief was a direct result of being intoxicated at the time of the offence and one that was a direct and proximate result of immediate prior intoxication. The Court of Appeal made the following observations (at [56] and [57]):

> 1 '*DPP v. Majewski* focused on crime committed while specifically under the influence of drugs or alcohol. Having said that, however, it is difficult to see why the language (and the policy identified) is not equally apposite to the immediate and proximate consequences of such misuse. That is not to say that long standing mental illness which might at some stage have been triggered by misuse of drugs or alcohol would be covered. The point is that a defendant who is suffering the immediate effects of alcohol or drugs in the system is, in truth, not in a different position to a defendant who has triggered or precipitated an immediate psychotic illness as a consequence of proximate ingestion of or drugs in the system whether or not they remain present at the time of the offence.
>
> 2 The fact is that medical science has advanced such that, in the modern age, the longer term *sequelae* of abusing alcohol or drugs are better known and understood; and, as in the present case, it was agreed that Taj's [D] episode of paranoia which led him to mistake the innocent Mr Awain [V] as a terrorist was a direct result of his earlier drink and drug-taking in the previous days and weeks. In the circumstances, we are not persuaded that the view expressed [by the Court of Appeal in *Harris*] applies to Taj, given that his paranoia was the direct and proximate result of his immediately prior drink and drug-taking. Alternatively and if need be contrary to the view expressed by [the Court of Appeal in *Harris*], as a matter of common law, we have no doubt that, had the House in *Majewski* … been presented with the same medical evidence and facts as in the present case, the House would have had no difficulty in applying the general common law principle with equal force to this case and holding that Taj had no defence because his state of mind had been brought about by his earlier voluntary intoxication. We see that as an application of *Majewski*, rather than an extension of that decision or, at the highest, a most incremental extension.'

The Court of Appeal underlined that the potential significance of voluntary intoxication in *Harris* and *Taj* differed.