

# **Lack of Capacity: Reforming the Law on Unfitness to Plead**

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## *Abstract*

*This article examines the new tests proposed for effective participation at trial and ability to plead guilty set out in the recently published Law Commission Report.<sup>1</sup> The two new tests aim to replace the current criteria on unfitness to plead developed in *M (John)*<sup>2</sup> and originating from *Pritchard*.<sup>3</sup> While the tests are a welcome development in a set of scrupulously drafted proposals, particular focus will be given to the absence of a diagnostic threshold.*

*Keywords: unfitness to plead, capacity, effective participation.*

## **Introduction**

The Final Report of the Law Commission on Unfitness to Plead, published in January 2016,<sup>4</sup> contains a draft Bill<sup>5</sup> with proposals for two new tests aimed at replacing the current test for unfitness to plead. In the first instance, a test for capacity to participate effectively in a trial is proposed.<sup>6</sup> Where a defendant is found to lack such capacity to be an effective participant in a trial, an additional test for capacity to plead guilty is introduced,<sup>7</sup> allowing defendants who are unable to withstand the rigours of a trial but who wish nevertheless to enter a guilty plea to be

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<sup>1</sup> LAW COM No 364 Unfitness to Plead Report (2016), ('the Report').

<sup>2</sup> [2003] EWCA Crim 3452. Discussed by the Law Commission at para. 2.52-2.59.

<sup>3</sup> (1836) 7 C & P 303.

<sup>4</sup> LAW COM No 364 Unfitness to Plead Report (2016).

<sup>5</sup> Criminal Procedure (Lack of Capacity) Bill, LAW COM No 364 Unfitness to Plead Report - Volume 2: Draft Legislation, 10.

<sup>6</sup> Clause 1.

<sup>7</sup> Clause 5.

able to do so. Further welcome proposals are made in relation to the trial of facts,<sup>8</sup> which aim to extend the tests to cover the Magistrates and Youth Courts,<sup>9</sup> and in relation to the use of intermediaries<sup>10</sup> with the aim that as many defendants as possible should have access to a fair trial. Loughnan has commented that '[t]he hallmark of the Commission's Report is balance.'<sup>11</sup> This approach is evident throughout,<sup>12</sup> the Law Commission's aim most succinctly expressed as being 'to balance the rights of the vulnerable defendant who cannot fairly be tried with the interests of those affected by the alleged offence and the need to protect the public.'<sup>13</sup> Not all commentators share this view, however, Padfield questioning whether "the "rights" of those who are so vulnerable that they cannot be fairly tried should be balanced with the "interests" of others.'<sup>14</sup> Nevertheless, such competing interests do need to be addressed and it is apparent that a balance is largely achieved. This article will focus on the proposals for the new tests; in particular, commentary will be made on the absence of a diagnostic threshold linking the test to a recognised medical condition, as is the norm with mental condition or capacity related defences.

## **The proposed tests**

Initial responses to the Law Commission's Consultation Paper favoured retention of the *John M* criteria,<sup>15</sup> alongside an additional criterion relating to a defendant's

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<sup>8</sup> Clause 9, described as the alternative finding procedure, under which all elements of the crime must be shown.

<sup>9</sup> Clauses 29-52.

<sup>10</sup> Clause 61.

<sup>11</sup> Loughnan, 'Between Fairness and "Dangerousness": Reforming the Law on Unfitness to Plead' [2016] Crim LR 451, 452.

<sup>12</sup> See e.g. para.5.3; para.9.70.

<sup>13</sup> Para.1.1.

<sup>14</sup> Padfield, "Prosecuting" those who are unfit to be prosecuted? (Editorial) [2016] Crim LR, 227-228, 227.

<sup>15</sup> M (John) [2003] EWCA Crim 3452.

decision-making capacity.<sup>16</sup> Under the current law, a defendant must show an inability in respect of one of 6 ways:

- (1) understanding the charges;
- (2) deciding whether to plead guilty or not;
- (3) exercising his right to challenge jurors;
- (4) instructing solicitors and counsel;
- (5) following the course of proceedings;
- (6) giving evidence in his own defence.<sup>17</sup>

The *John M* criteria address cognitive capacity, i.e. an ability to understand the trial process. The focus on a defendant's cognitive ability, or foundational competence,<sup>18</sup> was criticised by the Law Commission, which suggested that there has been too much of an emphasis on cognitive criteria, and not enough on decision-making ability.<sup>19</sup> Decision-making ability addresses an individual's functional capacity, i.e. the ability to make decisions and take part in a trial. The proposed test contained with the draft Bill is a combination of the two tests,<sup>20</sup> resulting in the following:

Clause 3(2) A defendant is to be regarded as lacking the capacity to participate effectively in a trial if the defendant's relevant abilities are not, taken together, sufficient to enable the defendant to participate effectively in the proceedings on the offence or offences charged.

This clause requires that the defendant's capacity will be assessed specifically in relation to the trial. Presumably the more complex the trial, the higher level of capacity needed. This reflects the Mental Capacity Act 2005 which assesses

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<sup>16</sup> Law Commission, *Unfitness to Plead – Analysis of Responses* (2013), paras.1.15-1.31.

<sup>17</sup> *M (John)* [2003] EWCA Crim 3452, [20].

<sup>18</sup> See Law Commission, *Unfitness to Plead – an Issues Paper*, (2014), ('Issues Paper') para. 2.23.

<sup>19</sup> Issues Paper, para.2.6.

<sup>20</sup> Issues Paper, 2.28-2.30.

capacity of a patient to make specific decisions, rather than decision-making capacity generally.<sup>21</sup> In *Marcantonio and Chitolie*<sup>22</sup> the court approved of the need to make an assessment of D's capacity context specific, stating that

'[a]n assessment of whether a defendant has the capacity to participate effectively in legal proceedings should require the court to have regard to what that legal process will involve and what demands it will make on the defendant. It should be addressed not in the abstract but in the context of the particular case.'<sup>23</sup>

The draft Bill goes on to include a non-exhaustive list of relevant abilities,<sup>24</sup> namely:

- (a) an ability to understand the nature of the charge;
- (b) an ability to understand the evidence adduced as evidence of the commission of the offence;
- (c) an ability to understand the trial process and the consequences of being convicted;
- (d) an ability to give instructions to a legal representative;
- (e) an ability to make a decision about whether to plead guilty or not guilty;
- (f) an ability to make a decision about whether to give evidence;
- (g) an ability to make other decisions that might need to be made by the defendant in connection with the trial;
- (h) an ability to follow the proceedings in court on the offence;
- (i) an ability to give evidence;

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<sup>21</sup> Loughnan, 'Between Fairness and "Dangerousness": Reforming the Law on Unfitness to Plead' [2016] Crim LR 451, 457.

<sup>22</sup> [2016] EWCA Crim 14.

<sup>23</sup> [2016] EWCA Crim 14, [7].

<sup>24</sup> Clause 3(4).

(j) any other ability that appears to the court to be relevant in the particular case.

Foundational competence, alongside the additional element of decision-making capacity makes for a more explicit test. While the current *John M* criteria could be claimed to set the bar too high, a test of decision-making capacity, on its own, has been said to set the bar too low.<sup>25</sup> Thus, a combination of the two tests is a welcome development, offering a wide discretion to the court to test both capacity and context.

Clause 6 of the draft Bill sets out the circumstances under which a defendant who lacks capacity to effectively participate in a trial may plead guilty to a charge: D's relevant abilities, must be, taken together, sufficient to enable D to effectively participate in '(a) the hearing in which D pleads guilty... and (b) any subsequent proceedings on the offence or offences in question.'<sup>26</sup> An additional non-exhaustive list is provided of relevant abilities, again representing a combination of foundational and functional capacity. In *Marcantonio and Chitolie*<sup>27</sup> Lloyd Jones LJ expressed support for a two part test which allows D to enter a guilty plea: '[t]here 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.'<sup>28</sup> These views echo those of the Law Commission that preventing defendants from entering a guilty plea on the basis of their lack of capacity to participate in a 'hypothetical trial, seems unjustifiably to undermine their legal autonomy.'<sup>29</sup>

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<sup>25</sup> Issues Paper, para.2.25.

<sup>26</sup> Clause 6(2).

<sup>27</sup> [2016] EWCA Crim 14.

<sup>28</sup> [2016] EWCA Crim 14, [8].

<sup>29</sup> LAW COM No 364 Unfitness to Plead Report (2016), para.3.150.

The proposals set out in the draft Bill set the threshold ‘neither too high nor too low’<sup>30</sup> and should increase the number of vulnerable defendants who are able to use the test which ‘captures the normative heart of the law of unfitness’.<sup>31</sup> These proposals for the new tests are welcome, carefully thought-out and a substantial improvement on the current test for unfitness to plead. The main flaw in these proposals, it is submitted, is the omission to include a diagnostic threshold.

### **The diagnostic threshold**

Notable within the new proposals is the omission of any need for a link to a recognised medical condition. This omission will not exclude the use of medical expertise entirely. In evidential terms, under clause 2(1):

The court may not determine that a defendant lacks capacity to participate effectively in a trial except on the written or oral evidence of two or more persons: (a) one of whom must be a duly approved registered medical practitioner, and (b) one of whom must be a qualified person<sup>32</sup> or a second duly approved registered medical practitioner.

Much has been written about the role of medical experts in legal decisions<sup>33</sup> and, clearly, there is a necessary role for medical experts as fact finders. This does not have to mean, however, that there should be no diagnostic threshold contained

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<sup>30</sup> Loughnan, ‘Between Fairness and “Dangerousness”: Reforming the Law on Unfitness to Plead’ [2016] Crim LR 451, 457.

<sup>31</sup> Loughnan, ‘Between Fairness and “Dangerousness”: Reforming the Law on Unfitness to Plead’ [2016] Crim LR 451, 456.

<sup>32</sup> Clause 2(6) In this section “qualified person” means—

(a) a registered medical practitioner,

(b) a registered psychologist, or

(c) a person who has a qualification specified by the Secretary of State by Regulations.

<sup>33</sup> See e.g. Moore, *Law and Psychiatry: Rethinking the Relationship* (1984), 227; Fulford, ‘Value, Action, Mental Illness, and the Law’, in *Action and Value in the Criminal Law*, Eds. Shute, Gardner and Horder, (1993), 300-310, 305; Morse, ‘Excusing the Crazy the Insanity Defense Reconsidered’, [1985] *Southern California LR* 779, 821.

within the substantive law; the reasons for this will be discussed below, following consideration of the presence of a diagnostic threshold in other areas of law, and an examination of the reasons why the Law Commission has chosen to exclude such a threshold.

A link to a diagnostic threshold, although absent in the current test of unfitness to plead, features in many other areas, both criminal and civil, and in other jurisdictions. The much criticised insanity defence contains a causal link to a 'disease of the mind'.<sup>34</sup> Current reform proposals would convert this to a 'recognised medical condition'.<sup>35</sup> In order to satisfy either of these defences, a defendant would have to not only fulfil the criteria within them, but also to have been suffering from either a disease of the mind or recognised medical condition. Similarly, the partial defence of diminished responsibility requires a defendant to have been suffering from an abnormality of mental functioning which arose from a recognised medical condition.<sup>36</sup> In civil law, the Mental Capacity Act 2005, which deals with a person's decision-making ability, and on which the Law Commission based its original proposals for reform,<sup>37</sup> requires an impairment of, or a disturbance in the functioning of, the mind or brain.<sup>38</sup>

The diagnostic threshold is present in other jurisdictions in relation to fitness to plead. In Scotland, a person is unfit for trial if he is incapable, by reason of a mental

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<sup>34</sup> M'Naghten (1843) 10 Cl & Fin 200. It is conceded here that the term 'disease of the mind' may have caused more problems than it has solved. It does, however, represent recognition of the need for a causal link between the condition from which D was suffering and the criteria for the defence.

<sup>35</sup> Law Commission Discussion Paper, Criminal Liability: Insanity and Automatism, 2013, paras 86-114.

<sup>36</sup> S2(1) of the Homicide Act 1957 as amended by s52 Coroners and Justice Act 2009.

<sup>37</sup> LCCP No.197: *Unfitness to Plead* (2010), para.3.13.

<sup>38</sup> Section 2(1) Mental Capacity Act 2005.

or physical condition, of participating effectively in a trial.<sup>39</sup> In Jersey, the test introduced in the case of *O'Driscoll*<sup>40</sup> requires a link to an unsoundness of mind, while in New Zealand D's unfitness to stand trial must be linked to mental impairment.<sup>41</sup> Consequently, it is not unthinkable to have a diagnostic threshold for other mental disorder defences and even for unfitness to plead in other jurisdictions, nor is it uncommon. If a diagnostic threshold is required for the Mental Capacity Act and the mental condition defences, then compelling reasons should exist as to why it should not be required for unfitness. The reasons provided by the Law Commission in this regard will be discussed below.

#### *Advantages of excluding diagnostic threshold*

The Law Commission remains 'squarely of the view that [a diagnostic threshold] should not be a determinative requirement'.<sup>42</sup> Primarily, the diagnostic threshold has been omitted on the grounds that the LC is not convinced that a threshold could not be 'sufficiently wide to encompass all likely reasons for participation difficulties'.<sup>43</sup> There may be conditions that escape definition, and therefore limit the availability of the test. As Loughnan comments, a diagnostic threshold would be unlikely 'to guarantee that the threshold for unfitness be set at an appropriate level'.<sup>44</sup> In its Issues Paper, the Law Commission stated that 'we doubt whether imposing a diagnostic threshold is likely to assist in maintaining a suitable threshold...'.<sup>45</sup> In

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<sup>39</sup> S53F Criminal Procedure (Scotland) Act 1995, as amended by s170(1) Criminal Justice and Licensing (Scotland) Act 2010.

<sup>40</sup> [2003] JRC 117 at [29].

<sup>41</sup> Section 4 Criminal Procedure (Mentally Impaired Persons) Act 2003.

<sup>42</sup> LAW COM No 364 Unfitness to Plead Report (2016).

<sup>43</sup> LAW COM No 364 Unfitness to Plead Report (2016), para.3.127(1).

<sup>44</sup> Loughnan, 'Between Fairness and "Dangerousness": Reforming the Law on Unfitness to Plead' [2016] Crim LR 451, 459.

<sup>45</sup> Law Commission, Unfitness to Plead: An Issues Paper, May 2014, para.2.40.



other words, if a diagnostic threshold is capable of suitable definition, it will make no difference to the test.

The Law Commission does not consider that diagnoses of vulnerable defendants will be prevented; they can still form part of any assessments as to D's lack of capacity and may remain a 'helpful guide' for determining malingerers or predicting recovery.<sup>46</sup> Given their continued role in providing evidence under clause 2(1), this may well be the case. Loughnan also sees that the role of expert medical professionals will not be reduced.<sup>47</sup> Additionally, according to the Law Commission, it will be possible to address future detention without being dependent on a diagnosis.<sup>48</sup> The more nuanced test should allow for greater discretion in 'guarding against individuals being found to lack capacity on the basis of profound political or religious views.'<sup>49</sup>

A further reason for the Law Commission omitting a link to a diagnostic threshold is that the link is not required under the current test.<sup>50</sup> It is evident that the outdated current test has survived without a diagnostic threshold. It is further conceded that, in practice, a diagnostic threshold may make very little difference to the availability of the test and, in fact, creates more obstacles for a vulnerable defendant. There are, however, principled reasons as to why the link to a diagnostic threshold should not be ruled out in future legislation.

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<sup>46</sup> LAW COM No 364 Unfitness to Plead Report (2016), para.3.127(2).

<sup>47</sup> Loughnan, 'Between Fairness and "Dangerousness": Reforming the Law on Unfitness to Plead' [2016] Crim LR 451, 459.

<sup>48</sup> LAW COM No 364 Unfitness to Plead Report (2016), para.3.127(3).

<sup>49</sup> LAW COM No 364 Unfitness to Plead Report (2016), para.3.127(4).

<sup>50</sup> LAW COM No 364 Unfitness to Plead Report (2016), para.3.127(5).

### *Advantages of including a diagnostic threshold*

In addressing the arguments presented above, it is worth reviewing the underlying rationale behind the test of unfitness to plead. The rationale, primarily, is that every individual is entitled to a fair trial, a right enshrined within the European Convention on Human Rights,<sup>51</sup> and dating back as far as clause 29 of the Magna Carta.<sup>52</sup>

A person who is unfit to plead may be unable to have a fair trial for a number of reasons, for example, he may be unable to instruct counsel, present his own version of events, challenge evidence, follow the proceedings, or make decisions as to how his defence should proceed. If D is unable to do these things, a trial of such a vulnerable defendant becomes one-sided and may comprise largely of guesswork on the part of the defence.<sup>53</sup>

In order for a trial to be fair, a defendant must, *inter alia*, be able to respond to charges made against him.<sup>54</sup> The ability to respond implies that the fit defendant is taking part in a moral conversation with the court; an allegation of wrongful conduct is made against him and he may admit or refute this allegation. Given that a trial represents a moral conversation, it is not a huge step to assert that D must be a moral agent, i.e. have sufficient moral understanding, in order to take part in this conversation. This moral agency should be present not only at a time of committing the act, but also at the time he stands trial.

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<sup>51</sup> Article 6.

<sup>52</sup> 1215.

<sup>53</sup> Howard, 'Unfitness to plead and the vulnerable defendant: an examination of the Law Commission's proposals for a new capacity test' (2011) *J. Crim. Law* 194, 196.

<sup>54</sup> R. A. Duff, 'Fitness to Plead and Fair Trials: (1) A Challenge' [1994] *Crim LR* 419 at 420-1.

Moral agency, according to the leading theory on culpability, requires that D has capacity and fair opportunity to make choices.<sup>55</sup> A vulnerable defendant may not be a moral agent due to a lack of a lack of capacity. It is submitted here that such a lack of capacity should be linked to a recognised medical condition. This is because depriving D of moral agency is not a decision to be taken lightly, especially since D will be deprived of his fundamental right to a fair trial. If we are to deprive an individual of moral agency, then we must be sure of our reasons for doing so; the link to a recognised medical condition would provide support for those reasons and would provide for consistency and predictability across the mental condition defences. The term 'recognised medical condition', broader than 'mental disorder,' is advocated by the Law Commission in its Discussion Paper on Insanity and Automatism.<sup>56</sup> As the term is also used for diminished responsibility,<sup>57</sup> then consistency in the law could be possible here. Such a term could be sufficiently wide. Given that DSM 5 and ICD 10<sup>58</sup> are increasingly inclusive,<sup>59</sup> all of the examples originally provided in the Consultation Paper appear to fall within a recognised medical condition.<sup>60</sup> Furthermore, it could be the case that the conditions listed within these diagnostic tools support the role of expert witnesses and assist in justifying

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<sup>55</sup> Law Commission, *Criminal Liability: Insanity and Automatism – A Discussion Paper* (2013), A. 18.

<sup>56</sup> Law Commission, *Criminal Liability: Insanity and Automatism – A Discussion Paper* (2013), para. 1.87.

<sup>57</sup> S52 Coroners and Justice Act 2009.

<sup>58</sup> International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) Version for 2010.

<sup>59</sup> Boysen, 'Revision of the DSM and Conceptual Expansion of Mental Illness: An Exploratory Analysis of Diagnostic Criteria' (2011) *Journal of Mind and Behavior*, 295-316.

<sup>60</sup> LCCP, Example 3A (para. 3.15) (F70 Mild mental retardation); Example 3B (para. 3.16) (F32 Major depressive disorder, single episode); Example 3C (para. 3.17) (F90 Attention-deficit hyperactivity disorder); Example 3D (para. 3.18) (F20.0 Paranoid schizophrenia); Example 3E (para. 3.19) (F42 Obsessive-compulsive disorder); Example 3F (para. 3.20) (F84.0 Autistic disorder); Example 3G (para. 3.43) (F70 Mild mental retardation).

Learning disorders are also listed within ICD 10: F80-89, although the term 'mental disorder' should be rejected in favour of a more general 'recognised medical condition'. Similarly speech/communication difficulties come within this classification – F80).

future detention. It is hoped that the nuanced test will be sufficient to address and exclude from its ambit those with political or extreme views, however this is more likely to be the case where a link is required to a recognised medical condition. The fact that there has been no link under the old, outdated test should not prevent a more principled approach to a modern test.

Crucially, perhaps the biggest obstacle to the inclusion of a diagnostic threshold is that developmental/emotional immaturity is not a recognised medical condition under DSM 5<sup>61</sup> or ICD 10.<sup>62</sup> If a link to a recognised medical condition were to be required, then the developmentally immature 10 year old could fail to satisfy the test, unless that immaturity can be linked, for example, to conditions on the autism spectrum or due to mild mental retardation. During the consultation process, the Law Commission has expressed its concern over the lack of a *doli incapax* defence.<sup>63</sup> Given the fact that the age of criminal responsibility stands at 10, and is one of the lowest in Europe, this is clearly a matter for concern.<sup>64</sup> If, and until, such reform is forthcoming, perhaps the new Bill will be the best solution for the developmentally immature child to be found unfit to plead. Certainly the Law Commission identifies a need to screen the capacity of children over the age of 14, appearing for the first time in the Youth Court.<sup>65</sup> The exclusion of a diagnostic threshold need not be the only means of achieving this outcome. One option could be to add developmental immaturity as a separate condition to be taken into account when applying the test in

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<sup>61</sup> *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (*DSM-5*) (2013).

<sup>62</sup> International Statistical Classification of Diseases and Related Health Problems 10th Revision (ICD-10) Version for 2010.

<sup>63</sup> Issues Paper, para. 8.41.

<sup>64</sup> The age of criminal responsibility is set at 14 in Austria, Germany and Italy; 15 in Norway, Sweden and Denmark; 16 in Spain and Portugal; 18 in Belgium and Luxembourg. Howard & Bowen, 'Unfitness to plead and the overlap with *doli incapax*: an examination of the Law Commission's proposals for a new capacity test' (2011) *J. Crim. Law* 380, 390.

<sup>65</sup> Report, para. 7.130.

the Youth Courts. In an earlier consultation paper, the Law Commission has proposed a separate limb of diminished responsibility, recognising the developmental immaturity of children below the age of 18.<sup>66</sup> Although this was not adopted by the Coroners and Justice Act 2009, the idea of a separate clause which links to developmental immaturity is not new. Until we have a more responsive defence of *doli incapax* we still need to be vigilant to the needs of children within the criminal justice system.

## **Conclusion**

A diagnostic threshold is not a new concept, whether in the mental condition defences, the civil law or other jurisdictions. Having a consistent diagnostic threshold within diminished responsibility, a reformed insanity defence and a test for lack of capacity could promote greater certainty within the law in these areas. If a recognised medical condition is required for the Mental Capacity Act and the mental condition defences, then we need compelling reasons as to why we should not, at least for the sake of consistency, require it for a reformed test of unfitness to plead. Conversely, if a diagnostic threshold is not needed for unfitness, then ought we to reconsider why it *is* required for insanity and diminished responsibility?

In the absence of a diagnostic threshold, there could be a danger that the test for lack of capacity will be set too low, although it is conceded that this is unlikely, given the proposed evidential requirement of medical expertise. It is further acknowledged, and indeed hoped, that this absence remains a relatively minor 'academic' issue in a set of welcome, logical and prudently drafted proposals. Nevertheless, the place of

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<sup>66</sup> LCCP 304, Murder, Manslaughter and Infanticide, 2006, para. 5.112.

academia is to raise such issues, and to provoke further debate: depriving a defendant of the most fundamental right to stand trial is a decision which ought to be robustly defensible, and it is the author's view that this can best be achieved by requiring a link to a recognised medical condition.