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Alternatives to inpatient evaluations of fitness to stand trial

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The mental health and legal systems generally function as separate and distinct systems in most countries. However, the increasing number of offenders with mental health problems has signaled a need for these two systems to work more cooperatively (Teplin, 1984). The deinstitutionalization movement in North America, for example, has led to less reliance on mental hospitals as a treatment facility for persons with mental health problems. Many of the individuals who had been or who might be committed to mental hospitals have joined the growing ranks of homeless in the cities (Belcher, 1988; Zapf, Roesch, & Hart, 1995), and mental health treatment in general has become less accessible to mentally ill people (Roesch & Golding, 1985). One consequence of this has been that the criminal justice system, particularly jails, has seen an increase in the number of people who have mental health problems (Roesch, 1995). Issues such as the insanity defense and competency to stand trial appear to be raised more frequently, perhaps as a consequence of the changing criminal justice population. This article will focus on the issue of competency to stand trial and need for reform in the manner in which it is evaluated by mental health professionals. We will rely on the practice in Canada but do so with the hope that our experiences will be of value to professionals in Portugal who may be dealing with similar issues.

Most Western judicial systems have provisions allowing a trial to be postponed or suspended if a criminal defendant is considered incompetent to participate in the defense. In Canada and Great Britain, this practice is referred to as fitness to stand trial, while other countries, such as the United States, refer to it as competency to stand trial. It has been estimated that, in Canada, approximately 5000 individuals are remanded each year for evaluations of fitness to stand trial (Webster, Menzies & Jackson, 1982). The numbers are even greater in the United States. Unfit to stand trial is a legal term that, as of 1992, has been defined in Canada as «unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so and, in particular, unable on account of mental disorder

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to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel» (C. C. C., S. 2., 1992). The courts in the United States use similar criteria that were established in the case of *Dusky v. United States* (1960). In Dusky, The Court held that for a defendant to be considered competent to stand trial, the defendant must have «sufficient present ability to consult with his attorney with a reasonable degree of rational understanding» and «a rational as well as factual understanding of the proceedings against him» (p. 402). Judicial proceedings are suspended for unfit defendants, who are then treated and returned to court when fitness is restored.

In Canada presence of a mental disorder is obviously an important factor in making a determination as to an individual's fitness, but mental disorder by itself is not sufficient to determine that a defendant is unfit. Rather, it must also be shown that the mental disorder affects the accused's performance on one or more of the three legal criteria. Since 1992, there have been finer distinctions made with regard to these three legal criteria. *Regina v. Taylor* (1992) held that «the test to be applied in determining the accused's ability to communicate with counsels is one of limited cognitive capacity» (p. 553). This means that it is not only necessary that the accused be able to act in his or her own best interests, but rather must only be able to recount the necessary facts pertaining to the offence to counsel so that counsel will then be able to present a proper defence. The appellate judge decided that the «limited cognitive capacity test strikes an effective balance between the objective of the fitness rules and the constitutional right of the accused to choose his own defence and to have a fair trial within a reasonable time» (p. 567). This case serves to narrow the criteria used to assess fitness to stand trial in Canada.

1. ASSESSMENT OF FITNESS

Traditionally, the courts in Canada and the United States have relied on mental health professionals, both psychiatrists as well as psychologist, to assess fitness to stand trial. An individual whose fitness has been questioned by the court is usually remanded to centrally located inpatient facility for an evaluation of fitness that usually takes place over a number of days. Some researchers have argued that inpatient assessments of fitness are often too lengthy and are unnecessary in the majority of cases. Roesch (1979) compared the decisions about fitness that were made following a brief interview with those following an extended period of detention in a psychiatric hospital. He determined that the additional information obtained during hospitalization had little influence on the judgments about fitness. Based on his research, Roesch suggested that such lengthy periods of hospitalization, which were not only costly but which also deprived these individuals of their liberty, were unnecessary for the majority of decisions. Prior to 1992 in Canada, individuals could initially be remanded for a period of 30 days and subsequent extensions could be added. As of 1992, the law in Canada has specified that individuals are only to be remanded for a period of 5 days for an assessment of fitness, however provisions are in place to extend this period to 30 days and beyond in exceptional circumstances. Some recent research, however, has suggested that individuals are still being detained for lengthy periods on remand. Zapf and Roesch (1996a) found that individuals who were remanded for assessments of fitness to stand trial in British Columbia, Canada were detained in custody for an average of 23 days and that the most prevalent remand ordered was 30 days, even though the *Criminal Code* states that individuals are to be remanded for 5 day evaluations.

Many researchers including Roesch and Golding (1980) and Menzies, Webster Butler and Turner (1980), have found that only a small proportion of those individuals who are remanded for fitness assessments are actually found unfit to stand trial. The numbers that have been cited range anywhere from 2% - 38% of those remanded for fitness that are actually found unfit to stand trial (cited in Roesch, 1978a). Several reasons have been given for this. First, because the jails in Canada and the United States are becoming increasingly overwhelmed with a growing number of mentally ill individuals, fitness remands are sometimes used a «backdoor» way of steering these individuals away from overcrowded penal institutions and into mental

health facilities (Roesch & Golding, 1985). Second, mentally ill individuals are sometimes remanded for fitness evaluations as a way of getting them into a mental health facility when they will not voluntarily commit Themselves to a mental health facility for treatment or when outpatient treatment is unavailable (Grisso, 1986). Third, it has also been suggested that the fitness assessment is also sometimes used as a legal maneuver that allows prosecutors more time to prepare their case and defence attorneys the opportunity to gain information that could be used to determine the feasibility of a later insanity plea (Roesch, & Golding, 1980). Recently, Zapf and Roesch (1996a) have suggested that it appears as if some mental health professionals view the fitness evaluation as an opportunity to treat an individual's mental disorder and to restore an individual to some form of fitness, even before a determination of the individual's fitness has been made the court.

2. ALTERNATIVES TO IMPATIENT EVALUATIONS OF FITNESS

2.1. *Screening instruments*

This tradition of remanding large numbers of individuals for fitness assessments, a small proportion of whom are actually found unfit, and of detaining these individuals for lengthy periods of time not only demands a lot of time and money but unnecessarily deprives these individuals of their liberty Roesch and others have suggested alternatives to this traditional method of inpatient fitness evaluation. Nearly 20 years ago Roesch (1978b) concluded that a brief, immediate screening interview could be used to evaluate fitness to stand trial. He argued that this method would result in a reduced cost to society and an increase in the protection of individual rights. Since that time, screening instruments have been developed by Roesch and others for use in both Canada and the United States to assess fitness.

There have been a number of instruments developed for use in the United States to assist in screening for competency to stand trial. These instruments include the Competency Screening Test (CST, Lipsett, Lelos & McGarry, 1971), the Competency Assessment Instrument (CAI, Laboratory of Community Psychiatry, 1974), the Interdisciplinary Fitness Interview (IFI, Golding, Roesch & Schreiber, 1984), the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR; Everington, 1990), and the Georgia Court Competency Test (GCCT; Wildman, White, & Brandenburg, 1990). To date, there has only been one instrument developed for use in Canada – the Fitness Interview Test – revised (FIT-R; Roesch, Webster, & Eaves, 1994). The original version, the Fitness Interview Test (FIT) was adapted from the CAI in 1984 for use in Canada.

2.2. *The Fitness Interview Test – Revised (FIT-R)*

The FIT-R (1994) was developed for use in Canada to assess fitness to stand trial. This instrument was deigned as a screening instrument that parallel the Canadian criteria for fitness that were set out in the 1992 *Criminal Code*. The FIT-R takes approximately 30 minutes to administer and consist of a structured interview which assesses three main areas: (a) the ability to understand the nature or object of the proceedings or factual knowledge of criminal procedure, (b) the ability to understand the possible consequence of the proceedings or the appreciation of personal involvement in and importance of the proceedings, and (c) the ability to communicate with counsel, or to participate in the defence. Each of these three sections is broken down into specific questions which tap into different areas involved in fitness to stand trial. The first section assesses the defendant's understanding of the arrest processes, the nature and severity of current charges the role of key players, legal processes, pleas, and court procedure. The second section assesses the defendant's appreciation of the range and nature of possible penalties, appraisal of available legal defense and appraisal of likely outcome. The final section assesses the defendant's capacity to communicate facts to the lawyer relate to the lawyer, plan legal strategy, engage in his or her own defence, challange prosecution witnesses, testify relevantly and manage courtroom behavior.

When validating a screening instrument, discrepancies between the results obtained by the screening instrument and those obtained by the

usual method of evaluation may occur. These discrepancies may be due to a problem with the screening device or because of differences in the individual who is being evaluated over time. When discrepancies occur, one might be tempted to ask which decision is correct. In fact, they may both be correct. It is possible that, at the time of the screening the defendant may have been under the influence of drugs and or alcohol, or have been in such an emotional state that it was not possible to assess fitness at that time and the decision would be that the individual's fitness was questionable and a remand would be ordered to allow a more thorough investigation of fitness. This means that by the time these remanded individuals are assessed at the institution they may no longer be under the influence and may be in a more rational state of mind, and therefore they may be found fit to stand trial. It is possible, then for an individual to be considered to be unfit to stand trial by the time they have been remanded to the forensic institution. It follows from this that not every individual remanded for an inpatient evaluation after being srceened will be found unfit, however, the majority of these defendats will be screened out as they are clearly fit to stand trial.

Recent research conducted with the FIT-R in Canada has indicated that this tool demonstrates excellent utility as a screening instrument (Zapf, & Roesch, 1996b). Screening instruments can most effectively be utilized by administering them to every individual whose fitness has been questioned by the courts. These screening assessments could take place in the community, at a pretrial centre at a jail holding cell, or even at the courthouse. The FIT-R has been shown to reliably screen out those individuals who are clearly fit to stand trial before they are remanded to an inpatient facility for evaluation. Specifically, in the sample that Zapf and Roesch used, 82% of the defendants would have been screened out before being remanded to an inpatient facility for assessment.

2.3. *Outpatient assessments*

Another alternative to inpatient evaluations of fitness would be to conduct the fitness assessment at an outpatient facility (Ogloff, & Roesch, 1992). While it is certainly true that psychologist and other mental health professionals are becoming increasingly involved in the criminal justice system, it is also the case that jail mental health services are not generally integrated into a larger network of community services. As Steadman, McCarty, and Morrissey (1989) found in their national United States study of local jails, the problem of mental health in the jails is simply not viewed as a community problem. Grisso, Cocozza, Steadman, Fisher, and Greer (1994) conducted a survey to determine the organization of pretrial forensic evaluation services in the United States. These researchers concluded that «the traditional use of centrally located, inpatient facilities for obtaining pretrial evaluations survives in only a minority of states, having been replaced by other models that employ various types of outpatient approaches» (p. 388). The Researchers also indicated that 7 states (14%) reported using screening evaluations that were defined as «brief evaluations at jail or courthouse to determine whether there was a need for a full evaluation of competence to stand trial» (p. 389). It appears that many states have made the move towards more community-based assessments of fitness and that a minority of them employ screening assessments. In Canada, however, it appears that we have not made the same move toward community-based assessments that have been made in the United States. In a recent report, Roesch, Ogloff and Hart (1996), indicated that 88% fitness and criminal responsibility remands in British Columbia over a 2-year period were sent to an inpatient facilty for assessment, leaving only 12% to be sent to an outpatient facility. The 1992 Canadian *Criminal Code* revisions state that the disposition made by the court is to be the «least onerous and least restrictive» to the accused as possible while still maintaining the protection of the public. It does appear that the majority if these defendants are being remanded to the least onerous and least restrictive facilities possible.

3. CONCLUSION

We have argued that criminal defendants are unnecessarily detained in forensic facilities for the purpose of evaluating fitness to stand trial. A large number of studies have demonstrated that

community-based screening of fitness is both feasible and cost effective (Fitch, & Warren, 1988; Keilitz, & Roesch, 1992; Melton, Weithorn, & Slobogin, 1985). Despite these findings, the majority of evaluations continue to be conducted in inpatient facilities, at a considerably greater cost to both the system and to the individual defendat who is deprived of liberty during the period of evaluation. Local mental health centers could play a greater role in providing these services, but to do so, the centers will need to view the local jail as part of the community. Legal and mental health professionals will need to work together to ensure that this reform is realized. We hope that the perspective taken in this article will prove helpful to mental health professionals in Portugal who are confronting similar issues in their country.

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ABSTRACT

The article is focused on the issue of competency to stand trial and the need for reform in the manner in which individuals are evaluated by mental health professionals.

The authors argue that criminal defendants for the purpose of evaluation are unnecessarily detered in forensic facilities for the purpose of evaluation fitness to stand trial. A large number of studies have demonstrated that community-based screening of fitness is both feasible and cost effective.

Legal and Mental Health professionals will need to work toghether to ensure that this reform is realized.

Key words: Competency to stand trial, Legal System Reform, Community-based screening of fitness.

RESUMO

Este artigo é dedicado ao tema da competência para a apresentação perante um Juiz e a necessidade de reformar o modo como os indivíduos são avaliados pelos profissionais de saúde mental.

Os autores argumentam que os arguidos são detidos desnecessariamente em estabelecimentos prisionais para a avaliação da sua capacidade para ir a julgamento. Através de um número alargado de estudos de investigação é possível demonstrar que a avaliação de base comunitária é não só possível como apresenta melhores índices em termos de custos.

Os profissionais do sistema judicial e da área da saúde mental precisarão de trabalhar em conjunto para assegurar que esta reforma se realiza.

Palavras-chave: Competência para ir a julgamento, Reforma do Sistema Legal, Avaliação de competência de base comunitária.