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INSANITY 2

1. USE OF THE M'NAGHTEN RULES

Card, *Card, Cross and Jones: Criminal Law*, 1995, p140:

Cases in which insanity has been expressly raised as a defence have been extremely rare. Partly, this has been a reaction against the prospect of prolonged, even lifelong, detention in a hospital[1]. But it has also reflected the narrow test of legal responsibility under the *M'Naghten Rules* and the existence since the Homicide Act 1957 of the defence to murder of diminished responsibility[2]. Before that Act accused persons generally raised the defence of insanity only in murder cases, but since then a plea of the wider defence of diminished responsibility has been far more common in such cases because, if that defence succeeds, the accused may be given a determinate prison sentence (or some other "normal" sentence).

A recent survey has indicated that, in a 14-year period commencing in 1975, the special verdict of not guilty by reason of insanity was returned only in respect of 49 accused[3]. Now that the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 has removed from judges, except in the case of murder, the obligation to commit indefinitely to hospital a person acquitted on grounds of insanity, it is likely that insanity pleas will become rather more common. However, in the first year of operation of the 1991 Act there were only five special verdicts, all of which concerned charges other than murder[4].

1 A recent survey has revealed that the consequences of a verdict of not guilty by reason of insanity have not been as severe in many cases as had been thought: Mackay "Fact and Fiction about the Insanity Defence" [1990] Crim LR 247. See also Mackay *The Operation of the Criminal Procedure (Insanity) Act 1964*.

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3 Mackay, loc cit.

4 Mackay and Kearns "The Continued Underuse of Unfitness to Plead and the Insanity Defence" [1994] Crim LR 576.

2. CRITICISMS OF THE M'NAGHTEN RULES

Smith and Hogan, *Criminal Law*, 1992, p207:

Almost from the moment of their formulation the Rules have been subjected to vigorous criticism, primarily by doctors, but also by lawyers. The Rules, being based on outdated psychological views, are too narrow, it is said, and exclude many persons who ought not to be held responsible. They are concerned only with defects of reason and take no account of emotional or volitional factors whereas modern medical science is unwilling to divide the mind into separate compartments and to consider the intellect apart from the emotions and the will. In 1923 a committee under the chairmanship of Lord Atkin recommended that a prisoner should not be held responsible:

"when the act is committed under an impulse which the prisoner was by mental disease in substance deprived of any power to resist."

Card, *Card, Cross and Jones: Criminal Law*, 1995, p142:

Five criticisms may be made of the *M'Naghten Rules*:

a) The rule concerning the burden of proof is anomalous. In the case of other general defences, the accused merely bears the burden of adducing evidence sufficient to raise a particular defence, and there is no reason why someone who pleads insanity should be any worse off.

b) It may be maintained that the word "wrong" should be interpreted to mean morally wrong in accordance with the opinion of the High Court of Australia. This is a very debatable point. The decision in *Windle* [1] to the effect that "wrong" in the *M'Naghten Rules* means legally wrong has been supported extra-judicially by Lord Devlin in the following words:

> I do not see how an accused man can be heard to say that he knew he was doing an act which he knew to be contrary to law, and yet he is entitled to be acquitted at the hands of the law. Guilt, whether in relation to the M'Naghten Rules, or any other rules, means responsibility in law[2].

In any event, the "knowledge of wrong" test as interpreted in *Windle* provides a very narrow ground of exemption since even grossly disturbed persons generally know that murder, for instance, is a crime[3]. Consequently, it is somewhat surprising that a recent survey found that, of the 49 special verdicts, the "knowledge of wrong" test was the relevant one in 23 of them and that in ten others both tests were regarded as satisfied[4]. It would appear from the survey that the test was treated by the judges more liberally in practice in directing juries than is necessary under the rules set out above and that little attempt was made in many cases to distinguish between ignorance of legal wrong and ignorance of moral wrong.

c) It is said that the *M'Naghten Rules* are based on the outmoded theory that partial insanity is possible. Lawyers cannot pronounce on the validity of this criticism, but partial insanity is regarded as a possibility in several other branches of the law in which the *M'Naghten Rules* are not applied[5].

d) The *Rules* are limited to cognitive factors, excluding all matters concerning volition or the emotions, and thus make no allowance for so-called "irresistible impulse". It is said that it should be a defence for a person to show that, although he was aware of the nature and quality of his act and knew it to be wrong, he found, owing to insanity, that it was difficult, if not impossible, to prevent himself from doing what he did. Allowance is made for irresistible impulse in a number of Commonwealth and North American jurisdictions and the defence of diminished responsibility admits it on a charge of murder.

e) It is objectionable that the label of insanity should be applied, and the consequences of the special verdict should follow, in cases, such as where the accused acted during an epileptic fit or hyperglycaemic coma or while sleepwalking, where the accused would not be regarded as insane in common -let alone medical-language. It is certainly odd that such people are labelled as insane by the law when the vast majority of people who are regarded medically (and in common parlance) as mentally ill or disordered are not. The incongruity of this has been recognised in the House of

Lords and the Court of Appeal but they have maintained that it does not lie within their power to alter the law in this respect[6].

1 [1952] 2 QB 826.
2 [1954] Crim LR 681-682.
3 Butler Committee on Mentally Abnormal Offenders (Cmnd 6244), para 18.8.
4 Mackay "Fact and Fiction about the Insanity Defence" [1990] Crim LR 247. See also Mackay *The Operation of the Criminal Procedure (Insanity) Act 1964*.
5 *Hill* (1851) 2 Den 254; *Re Bohrmann*, *Caesar and Watmough v Bohrmann* [1938] 1 All ER 271.
6 *Sullivan* [1984] AC 156 at 173, [1983] 2 All ER 673, per Lord Diplock; *Burgess* [1991] 2 All ER 769 at 776, CA.

3. PROPOSALS FOR REFORM

The **Butler Committee on Mentally Abnormal Offenders** reported in 1975 that major reform was necessary. The Report recommended the introduction of a new verdict of "not guilty by reason of mental disorder" which could be returned in two situations:

a) where the defendant was unable to form the requisite *mens rea* due to mental disorder; or
b) where the defendant was aware of his actions but was at the time suffering from severe mental disorder.

The Report's recommendations have been ignored by successive governments.

The **Draft Criminal Code Bill (1989)** (Law Com. No. 177) incorporates, with some adaptations, proposals for reform made by the Butler Committee. Clauses 35 and 36 of the draft code bill detail the two circumstances in which the proposed mental disorder verdict would be returned: (i) where all the elements of the offence are proved but the mental disorder nevertheless should result in an acquittal (corresponding to the "wrong" limb), and (ii) where the mental disorder precludes the required fault (corresponding to the "nature and quality" limb).

Clause 35 provides:

"(1) A mental disorder verdict shall be returned if the defendant is proved to have committed an offence but it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was at the time suffering from severe mental illness or severe mental handicap.

(2) Subsection (1) does not apply if the court or jury is satisfied beyond reasonable doubt that the offence was not attributable to the severe mental illness or severe mental handicap."

Clause 36 seeks to provide for the defendant who, through mental disorder, acts without the requisite fault element. It states:

"A mental disorder verdict shall be returned if-
(a) the defendant is acquitted of an offence only because, by reason of evidence of mental disorder or a combination of mental disorder and intoxication, it is found that he acted or may have acted

in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed; and
(b) it is proved on the balance of probabilities (whether by the prosecution or by the defendant) that he was suffering from mental disorder at the time of the act."

4. COMMENTARY

Card, *Card, Cross and Jones: Criminal Law*, 1995, p143-4:

The draft Bill provides … two alternative grounds for the verdict of not guilty on evidence of mental disorder:

i) By cl 35, a mental disorder verdict could be returned if the accused was proved to have committed an offence but it was proved on the balance of probabilities (whether by the prosecution or by the accused) that he was at the time suffering from severe mental illness or severe mental handicap. This would not apply if the jury or magistrates were satisfied beyond reasonable doubt that the offence was not attributable to the severe mental illness or severe mental handicap. This provision would extend the law considerably. It covers not only cases at present covered by the "knowledge of wrong" test under the *M'Naghten Rules* but also any other case where, at the time of the act or omission charged, and proved, the accused, although able to form intentions and carry them out, was suffering from severe mental illness or severe mental handicap. This ground would be of importance where the prosecution succeeded in proving the necessary mens rea for the offence charged.

ii) By cl 36, the mental disorder verdict could also be returned if the accused was acquitted of an offence only because, by reason of mental disorder or a combination of mental disorder and intoxication, it was found that he acted or might have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed, and it was proved on the balance of probabilities (whether by the accused or the prosecution) that he was suffering from mental disorder at the time of the act. By cl 34, "mental disorder" is defined as severe mental illness, arrested or incomplete development of mind, or a state of automatism (not resulting only from intoxication) which is a feature of disorder, whether organic or functional and whether continuing or recurring, that may cause a similar state on another occasion. The present ground would work as follows: if, although the prosecution had proved the actus reus, it was found that the accused acted or may have acted in a state of automatism, or without the fault required for the offence, or believing that an exempting circumstance existed, the accused would be entitled to a complete acquittal unless the jury or magistrates were satisfied on the balance of probabilities that he was mentally disordered at the time of the offence.

The draft Bill does not set out provisions relating to the disposal of those subject to a mental disorder verdict, but it provides that they are to be included in one of its schedules. Doubtless, that schedule would make similar provision to that which currently applies if a verdict of not guilty by reason of insanity is returned.

Clarkson and Keating, *Criminal Law: Text and Materials*, 1994, p373:

These proposals, which are mainly based on the Butler Committee's recommendations, would constitute a significant improvement on the present law[1]. The new verdict of not guilty by reason of mental disorder would not only build upon recent reforms by not leading to mandatory commitment[2] but the new label would also avoid the offensive stigma that surrounds a finding of insanity. Because of these changes mental disorder has been defined[3] so that it will no longer be possible to distinguish between the epileptic, the diabetic and the defendant with a brain tumour: "(i)f any of these conditions causes a state of automatism in which the sufferer commits what would otherwise be an offence of violence, his acquittal should be on evidence of 'mental disorder'."[4]

1 See further, M. Wasik, "Codification: Mental disorder and Intoxication under the Draft Criminal Code" (1986) 50 J.Crim.L. 393. For an earlier defence of the Butler proposals see S. Dell, "Wanted; An Insanity Defence that can be Used" [1983] Crim LR 431.

2 The Draft Code does not address the issue of disposal in detail although the drafters were clearly committed to flexible powers of disposal (paras. 11.34-11.36). Clause 39 provides for the drafting of a Schedule concerning such powers. Whether this would merely reflect the reforms contained in the 1991 Act or whether flexibility would also extend to murder is unclear.

3 In Clause 34.

4 Draft Criminal Code (1989), Law Com. No. 177, p. 224.