

**Reprinted with Permission of the Canadian Bar Association**

**CANADIAN BAR ASSOCIATION**  
**NATIONAL CRIMINAL JUSTICE SECTION**  
**COMMITTEE ON CRIMINAL CODE REFORM**

**MENTAL DISORDER**

**W.P. #4**

G.D. McKinnon

June 28, 1991

## INDEX

	<u>Page</u>
I. Overview	1
II. Historical Perspective	9
III. Analysis of Section 16	14
IV. Diminished Responsibility	28
V. Law Reform Commission Proposal	32
VI. Anglo-American Jurisdictions	43
VII. Unfairness to Plead	54
VIII. Issues for Consideration	58

## MENTAL DISORDER

### I. OVERVIEW

---

The criminal law has always presumed that persons are sane and responsible. Sanity is a precondition to criminal liability - having the capacity to reason and to choose right from wrong. An insane person does not have this capacity for criminal intent. As Gerry Ferguson has stated:

It is immoral to punish those who do not have the capacity to reason or to choose right from wrong ... It is these dual capacities - reason and choice - which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution of responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.<sup>1</sup>

It is now recognized as a principle of fundamental justice under s. 7 of the *Charter* that the criminal justice system cannot convict a person who is insane at the time of the offence: *Swain v. The Queen*, unreported, May 2, 1992 (SCC) 28.

Parliament codified the criteria for determining criminal responsibility in s. 16 of the *Criminal Code*, which was based on *McNaghten's Case*, (1843), 10 Cl & Fin. 200:<sup>2</sup>

#### Insanity

16(1) No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.

(2) For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

(3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.

(4) Everyone shall, until the contrary is proved, be presumed to be and to have been sane.

- 
1. Ferguson, "A Critique of Proposals to Reform the Insanity Defence", (1989) 14 *Queens L.J.* 135 at page 140.
  2. *Cooper v. The Queen* (1980) 51 CCC (2d) 129 (SCC) at 139.

For a person to be insane within the statutory definition of s. 16 a person must be incapable of appreciating, in the analytical sense of using one's knowledge or experience, the nature and quality of the act or of knowing in the positive sense that his act was morally wrong: *R. v. Chaulk* (1990) 62 CCC (3d) 193 (SCC), *R. v. Barnier* (1980) 51 CCC (2d) 193 (SCC) @ 203.

### Nature of Insanity Plea

Whether the plea of insanity is an exemption from criminal responsibility, a denial of the *mens rea* or *actus reus*, or an excuse is the subject of considerable debate.

In its most recent and thorough statement on the nature of the insanity defence, the majority of the Supreme Court of Canada in *R. v. Chaulk* (1990) 62 CCC (3d) 1 preferred to characterize it as an exemption to criminal liability based on an incapacity for criminal intent. In the majority judgment of Lamer, C.J. he points out that a claim of insanity under the first branch of s. 16(2) can be a denial of *mens rea* or a denial of voluntary *actus reus*, while under the second branch it is a claim to be excused for what would otherwise be criminal behaviour. Underlying both claims is the assertion that the accused has no capacity for criminal intent, *i.e.*, "... he is claiming that he does not fit within the normal assumptions of our criminal law model because he does not have the capacity for criminal intent."<sup>3</sup> "Exemption from criminal responsibility" is thus considered an appropriate term to cover both kinds of insanity claims.

This analysis can be traced to the earlier decisions of the Supreme Court of Canada where Martland, J. for the majority in *Schwartz v. The Queen* (1976) 29 CCC (2d) 1 appears to treat s. 16(2) as an exemption from criminal liability and Dickson, C.J. for the majority in *Cooper v. The Queen*, *supra* and for the Court in *R. v. Abbey* (1982), 68 CCC (2d) 394 adopted Glanville Williams' view that s. 16(1) negatives *mens rea*:

In determining the meaning of the word "wrong" in section 16(2) it is important to remember that this subsection only becomes operative if, previously, it has been proved beyond a reasonable doubt that the accused person has committed a crime; *i.e.*, has been guilty of some criminal act with the requisite criminal intent. It is at that point that he may seek the protection against conviction afforded by s. 16(1) on the ground that the offence was committed while he was insane.

*R. v. Schwartz, supra, @ 10*

An accused may be aware of the physical character of his action (*i.e.*, in choking) without necessarily having the capacity to appreciate that, in nature and quality, that act will result in the death of a human being. This is simply a restatement, specific to the defence of insanity, of the principle that *mens rea*, or intention as to the consequences of an act, is a requisite element in the commission of a crime.

*Cooper v The Queen, supra, @ 147*

---

3. *R. v. Chaulk* (1990) 62 CCC (3d) 1 (SCC) @ 207. See also Healy, "R. v. Chaulk: Some Answers and Some Questions on Insanity," (1991) 2 C.R. (4th) 95.

Although there is some controversy in academic circles, I adopt the more traditional view as found by Glanville Williams, *Criminal Law, The General Part*, 2nd ed. (1961), para. 166, p. 525, that a delusion falling under the "first arm" of the insanity defence negatives an element of the crime, the *mens rea* ... The mental element must be proved with respect to all circumstances, and consequences, that form part of the *actus reus* ... A delusion which renders an accused "incapable of appreciating the nature and quality of his act" goes to the *mens rea* of the offence and brings into operation the "first arm" of section 16(2): he is not guilty by reason of insanity ...

*R. v. Abbey* (1982) 68 CCC (2d) 394 (SCC) 403

The same considerations do not apply for the second branch of s. 16(2):

The second arm of section 16(2) is concerned with cognitive capabilities, with knowledge, and not with appreciation of consequences. Section 16(2) speaks in terms of knowledge of wrongness, not appreciation of wrongness. One must, I think, draw a distinction between what might be termed "result" crimes and what might be termed "knowledge" crimes. In respect of the former it is correct to speak of appreciation of consequences. The capacity to appreciate the nature and quality of his act refers to the physical character of the act. It requires both an appreciation of the factors involved, and sufficient mental capacity to measure and foresee the consequences of the conduct ...

When one is considering the legal aspects of a crime such as the importation of a narcotic the principle inquiry should be directed not to appreciation of physical consequences but to knowledge of wrongness.

*R. v. Abbey, supra*, 405

Dickson, J. acknowledged in *R. v. Abbey, supra* @ 403 that s. 16(2) could exempt from liability, notwithstanding the existence of *mens rea*. He agreed with the following passage from Martin, J.A.'s judgment for the court in *R. v. Rabey* (1977) 37 CCC (2d) 461 (OCA) @ 485:

The defence of insanity has two aspects: (a) It may negative *mens rea* in the sense of intention, foresight or knowledge with respect to the *actus reus*, and (b) notwithstanding the existence of *mens rea*, in the formal sense, of intention, foresight or knowledge with respect to the *actus reus*, it exempts from liability if the criteria of insanity are met.

Following these decisions, academics expressed the view that the insanity defence had been reduced to a *mens rea* defence: Anthony Saunders, "The Defence of Insanity" (1984) 42 U.T. Fac. L. Rev. 129 @ 131; Gerry Ferguson, "A Critique of Proposals to Reform the Insanity Defence" 14 Queens Law J. 135 @ 139.

The following passages from Lamer, C.J.'s judgment in *R. v. Chaulk, supra*, are instructive:

#### First Branch

... incapable of appreciating the nature and quality of an act ...

A claim of insanity, with its underlying claim of criminal capacity, could give rise to a denial of the *actus reus* or of the *mens rea* in a particular case. For example, an accused could claim that his or her mental condition is such that when the alleged crime took place, he or she was not acting consciously. This is akin to a claim of insane automatism which denies the essential element of voluntary *actus reus* on the basis of an internal cause - the accused's disease of the mind: *R. v. Rabey* (1980), 54 CCC (2d) 1, 114 DLR (3d) 193 [1980] 2 SCR 513. An accused could also raise the argument that his or her mental condition was such that while he or she was acting consciously and involuntarily, he or she did not have the requisite *mens rea*. For example, a person charged with murder could claim that while he consciously and voluntarily did the act of chopping, he thought that he was chopping a loaf of bread in half, when, in fact, he was chopping off the victim's head: see Kenny's *Outlines of Criminal Law*, 19th Ed. (1966), p. 83 N.1. In such a case, the insanity claim is manifested as a denial of *mens rea*. The accused has no intention to bring about the consequence of death.

#### Second Branch

... incapable of knowing that an act or omission is wrong ...

In yet another case, an accused, charged with murder, could argue that while she consciously and voluntarily did the act of killing and while she desired to bring about the death of the victim, she did so because her mental condition was such that she honestly believed that the victim was evil incarnate and would destroy the earth if the accused did not kill him. In such a case, the insanity claim is manifested not as a denial of *actus reus* or *mens rea*, but rather as a defence in the nature of an excuse or a justification based on the fact that the accused's mental condition rendered her incapable of knowing that the act was wrong.

This court also held in *Abbey* that the "second branch" of s. 16(2) "is concerned with cognitive capabilities, with knowledge, and not with appreciation of consequences." This provision is also based on *incapacity for criminal intent*. Such incapacity arises because the accused, due to his mental condition, is incapable of distinguishing between right and wrong. This claim of incapacity does not manifest itself as a denial of *mens rea* in the particular case. The criminal law is not concerned with whether a sane accused knew that his act was wrong. Knowledge of wrongness is not part of the requirement of *mens rea*. This is because sane people are presumed to have the capacity to distinguish between right and wrong - if a sane person is of the opinion that murder is not wrong, his opinion makes him "bad" (as opposed to sick) because he has the capacity to distinguish right from wrong. However, if an accused makes a claim of insanity under the "second branch" of s. 16(2), he is challenging the assumption that he is capable of distinguishing between right and wrong. If it is proved that his mental condition brought about such incapacity, he will be excused from criminal liability despite the elements of *actus reus* and *mens rea* being established in the particular case.

Lamer, C.J.'s approach is somewhat different from that of McLachlin, J. in the minority judgment of *R. v. Chaulk, supra* @ 261-276. Both agree that criminal insanity is concerned with incapacity. However for Justices McLachlin, Sopinka, and L'Heureux-

Dubé, the issue of *actus reus* and *mens rea* never arises where a plea of insanity is successfully invoked. As seen from the following passages of their minority judgment at pp. 264-5 the issue is the accused's capacity to appreciate or know and not what the accused actually did appreciate or know:

This point is made by the authors of Mewitt and Manning, *Criminal Law*, 2nd ed. (1985), who specifically counsel against viewing the insanity provisions of the *Criminal Code* merely in terms of the essential elements of, or exculpatory defences to, an offence (at pp. 254-5):

A problem arises if one attempts to fit insanity into the confining limits of *actus reus* and *mens rea*. While insanity may negative either *actus reus* or *mens rea*, it is suggested that this fact is merely incidental to the scope of the issue which, put shortly, states that whether or not the *actus reus* and *mens rea* are affected, a person within s. 16 is entitled to be acquitted.

#### The Language of Section 16

Having established that the underlying rationale of our insanity provisions is the broad concept that criminal responsibility should be confined to persons capable of discerning between right and wrong, I turn to s. 16 of the *Code* itself. In my view, an examination of the wording and functioning of s. 16 confirms that it should be read as relating to this fundamental precondition for the assignment of criminal responsibility rather than to the elements of an offence or to particular defences.

The language of the *Code* makes it clear that s. 16 is concerned only with capacity for criminal responsibility. Section 16(2) provides that a person is insane when, due to disease of the mind, the person is *incapable* of appreciating the nature or quality of an act or omission or of knowing that an act or omission is wrong. As the authors of Mewitt and Manning point out at p. 234, the proper inquiry is thus not into what the accused *actually* appreciated but, rather, into what the accused's *capacity* was. In insanity the ultimate question is the accused's capacity - it is not concerned with what he actually appreciated and is thus not concerned with actual *mens rea* or actual *actus reus*. Insanity is a defence because it affects the capacity of the accused.

By contrast, insanity as it relates to the essential elements of an offence or defences to it, on the other hand, is concerned not with capacity, but with the actual state of mind of the accused. To focus on insanity as somehow denying an essential element of the offence or establishing a defence is to fail to appreciate the proper operation of the insanity provisions found in s. 16 of the *Code*. It confounds the question of capacity for criminal responsibility with the quite different question of what the accused *actually* appreciated. It is true, of course, that an accused who does not have the capacity to appreciate something cannot have appreciated it; the point, however, is that the insanity inquiry never looks beyond capacity to actual *mens rea* or *actus reus*. For practical purposes, where insanity becomes an issue at trial, there will be objective evidence from which, absent the claim of insanity under s. 16 of the *Code*, the trier of fact will be justified in inferring the existence of the essential elements of the offence, *i.e.* the *actus reus* and *mens rea*. The claim of insanity, however, pre-empts the traditional inference - drawing process on the ground that a person without the capacity for choice as defined in s. 16 of the *Criminal Code* is not morally culpable. Because of lack of capacity, therefore, the issue of *actus reus* and *mens rea* never arises.

These judgments of the Supreme Court of Canada in *R. v. Chaulk*, *supra*, help to clarify the relationship between insanity and the mental element, which in recent years has been



one of the more confusing aspects of the law in this area. When the two concepts are allowed to overlap conceptually it is even more difficult for jurists and juries to keep the issues of insanity and *mens rea* apart.

## PROCEDURE AT TRIAL

Instructing juries on how to consider the insanity defence along with the other issues raised at trial simply adds to the confusion.

Generally, the jury is instructed to first consider whether an accused committed the crime. Only if they are satisfied beyond a reasonable doubt that he did so should they go on to consider the issue of insanity: *Schwartz v. The Queen, supra*, p. 10, *R. v. Frisbee* (1989), 48 CCC (3d) 386 (BCCA) 421. The jury is instructed that if they are not satisfied on a balance of probabilities that the accused was insane at the time he committed the offence they must then consider the evidence of insanity, along with all the other evidence, in determining whether or not the accused had the necessary intent to commit the offence: CRIMJI, para. 8.32-2,10.

In its 1976 report on Mental Disorder the Law Reform Commission recommended that the issue of insanity be considered in a separate hearing subsequent to a finding that the accused had otherwise committed both the *actus reus* and *mens rea*. In *Swain v. The Queen*, unreported, May 2, 1991 @ pp. 39-40, the Supreme Court of Canada restricted the Crown's right to raise the insanity issue to such a post-conviction hearing:

Under this scheme, the issue of insanity would be tried after a verdict of guilty had been reached, but prior to a conviction being entered. If the trier of fact then subsequently found that the accused was insane at the time of the offence, the verdict of not guilty by reason of insanity would be entered. Conversely, if the trier of fact found that the accused was not insane, within the meaning of section 16, at the time of the offence the conviction would then be entered.

If this became the practice for the determination of all insanity issues, whether raised by the Crown, defence or by the evidence generally, it would prevent the conceptual overlapping of insanity with *mens rea* and eliminate procedural confusion.

### Consequences of Finding Insanity

Until May 2, 1991 when the Supreme Court of Canada in *Swain v. The Queen* struck down s. 614(2) of the *Criminal Code*, the consequence which followed a finding of "not guilty by reason of insanity" on an indictable offence had always been automatic committal for treatment in a hospital under a Lieutenant-Governor's warrant for an indefinite period.<sup>4</sup> The statutory provisions for this procedure are found in the *Criminal Code* under ss. 614, 617, 618, 619. In *Re Rebic v. The Queen* (1986), 28 CCC (3d) 154 @ 171 Macfarlane, J.A. for the B.C. Court of Appeal referred to these provisions in the following words:

The objective of the legislation is to protect society and the accused until the mental health of the latter has been restored. The objective is to be achieved by treatment of the patient in a hospital, rather than in a prison environment.

The supervision and treatment of an accused acquitted of an indictable offence on account of insanity was at the discretion of the Lieutenant-Governor and his appointed Board of Review, ss. 617-619. A detainee's mental condition was reviewed within six months of his detention and once every 12 months thereafter. Where a person recovered, the Board was to make a recommendation to the Lieutenant-Governor for his or her release upon appropriate conditions. However, prior to committal there was no opportunity for a hearing on the issue of current mental state by virtue of s. 614(2) which reads as follows:

Where the accused is found to have been insane at the time the offence was committed, the court, judge or provincial court judge before whom the trial is held shall order that he be kept in strict custody in the place and in the manner that the court, judge or provincial court judge directs, until the pleasure of the Lieutenant-Governor of the province is known.

The Supreme Court of Canada struck that section down for two reasons:

- i) the lack of a hearing to determine a person's present mental condition deprived an accused of his section 7 *Charter* right to liberty in a way that was not in accordance with the principles of fundamental justice; and
- ii) a person's section 9 *Charter* right not to be detained arbitrarily was restricted because there were no criteria for the exercise of the trial judge's power to detain.

In giving judgment for the majority in *Swain v. The Queen*, Lamer, C.J. stated at p. 69 that even if the provisions in ss. 617 and 619 requiring subsequent hearings or review were in accord with the principles of fundamental justice that could not change the fact that the initial remand under s. 614(2) was ordered by the trial judge without any opportunity for a hearing.

---

4. If the accused is acquitted of a summary conviction offence by reason of insanity there is no authority in the *Code* for further detention or treatment.

Section 614(2) will continue in effect for a transition period to expire six months from the date of judgment, May 2, 1990. During this time any new detention under s. 614(2) will be limited for a period of 30 to 60 days. Within this transition period it is expected that Parliament will enact a replacement for s. 614(2) that will provide for a hearing to determine the current mental condition of the person. His detention will only be justified if he is found to be dangerous due to his insanity at the time of the offence.<sup>5</sup>

The new legislation will probably be based on Parliament's proposed amendments to the *Criminal Code* (Mental Disorder) introduced on June 26, 1986 by the Minister of Justice as draft legislation. The main points of that draft legislation were summarized in Gerry Ferguson's paper on "A Critique of Proposals to Reform the Insanity Defence" @ p. 150:

The Lieutenant-Governor's role is abolished and the final decision-making authority in regard to the disposition of such persons is placed in a Board of Review. The Board is mandated to apply the least intrusive or restrictive option, keeping in mind the interests of the accused and the protection of society. The legislation establishes procedural guidelines for the Board of Review and the Board's decision is subject to judicial review. The insane accused will no longer be subject to indefinite confinement. Apart from murder, where detention may be for life, there is an outer limit on the length of detention - ten years for certain serious offences against a person and two years for all other offences. If a mentally disordered offender is still dangerous at the end of that expiry period, an application will have to be made under the provincial mental health legislation to have the person civilly committed. The legislation also provides for a new sentencing option referred to as a hospital order. These deal with persons who are not found insane but who are in need of hospital treatment for their mental disorder.

If the practical effects of the new legislation make the time for treatment easier than the sentence in prison, there will be an increased use of the insanity plea and a heightened importance for finding a new definition.

---

5. *Swain v. The Queen*, May 2, 1991 (SCC) p. 77.

## II. HISTORICAL PERSPECTIVE

---

### Capacity for Choice - Right & Wrong Test

Since the Book of Genesis, the capacity for choice between good and evil has been recognized as the precondition to moral blameworthiness. If a person lacked the capacity to choose between right and wrong, he could not be held responsible for his actions. Historically only two persons have fallen within this category - the infant and the insane, although the intoxicated person has also been included in recent years. Ancient Hebrew law and Greek philosophers recognized this principle as did the early English scholars:

We must consider with what mind or with what intent a thing is done ... in order that it may be determined accordingly what action should follow and what punishment. For take away the will and every act will be indifferent, because your state of mind gives meaning to your act, and the crime is not committed unless the intent to injure intervenes, nor is a theft committed except with the intent to steal ... And this is in accordance with what might be said of the infant or the madman, since the innocence of design protects the one and lack of reason in committing the act excuses the other.

Henry Bracton in *De Legibus et Consuetudinibus Angliae* (13th century)

If a mad man or a naturall foole, or a lunatike in the time of his lunacie, or a childe y apparently *hath no knowledge of good nor evil*, do kil a ma, this is no felonious acte, nor anything forfeited by it ... for they cannot be said to have any understanding wil.

William Lambarde (1581)

But those that are to be esteemed guilty of any offences must have the use of their reason, and be at their own disposal or liberty. For those that want reason to distinguish betwixt good and evil (as infants under the age of discretion (viz), under the age of 14, ideots, lunatiks, etc.) ought not to be prosecuted for any crime.

Wood, *An Institute of the Laws of England*, p. 339 (1728)

In *History of the Pleas of the Crown* (1736), Matthew Hale suggested that the test for excusing a person's conduct for reasons of insanity should be whether or not he had "as great an understanding, as ordinarily a child of 14 years hath."<sup>6</sup>

In *Schwartz v. The Queen* (1976) 29 CCC (2d) 1 (SCC) @ 16 Dickson, J.'s dissenting judgment refers to the interrelationship of the rules affecting criminal responsibility of children and of insane persons, the historical development of the "right and wrong" test and the McNaghten Rules that were all canvassed in an article written by Platt and Diamond.<sup>7</sup> In their article the authors state:

- 
6. Quen, "Anglo-American Concepts of Criminal Responsibility: A Brief History", *Mental Disorder and Criminal Responsibility*, Toronto.
  7. Platt and Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and its Subsequent Development in the United States and an Historical Survey" 54 *Calif. Law Rev.* 1227.

The evolution of the "right and wrong" test of criminal responsibility can be traced from Hebrew law, Greek moral philosophy, Roman law, the literature of the church in the Middle Ages, and English common law to its final elaboration in American case-law. There is substantial evidence to suggest that the role of the child, as a perspective member of adult society, was an expedient and ideologically meaningful reference for rules of criminal responsibility for the insane criminal offender. The "right and wrong" test was used in England to determine the criminal capacity of children as early as the 14th century and of the insane probably by the 17th century. It has been used widely in the United States for both children and the insane since 1800.

It is clear that the "right and wrong" test of criminal responsibility did not arise in 1843, either in England or in the United States. The "knowledge of right and wrong" test, in the form of its earlier synonym ("knowledge of good and evil"), is traceable to the *Book of Genesis*. The famous *McNaghten* trial of 1843 and the subsequent opinion of the judges provided only the name, "McNaghten Rule." The essential concept and phraseology of the Rule were already ancient and thoroughly embedded in the law.

### Insanity Trials in England

In Walker's text, *Crime and Insanity in England* (1968) at p. 24, he describes one of the first reported trials (1280) in which insanity was raised as an issue. The jury found that the accused was in a state of frenzy when he had hanged his daughter, but that he had not done so "feloniously or through malice aforethought." Although the penalty for a felony was automatic, the King could excuse him on the basis of his insanity. Walker describes the situation in the following manner at p. 24 of his text:

The state of affairs represented a compromise between a legal system founded on strict liability and the ecclesiastical insistence on the importance of *mens rea*. On the one hand the harm done must be acknowledged by the legal process; on the other hand the legal process could not be carried to its grim conclusion if the harm was unintentional. So there must be interference with the due course of law by the one person who could properly interfere - the King.

The King granted pardon. In *History of English Law*, Sir W.S. Holdsworth points out that in the earliest common law a lunatic (mentally diseased) or idiot (mentally defective) who was found insane at the time of the offence was granted an automatic pardon.<sup>8</sup> The King enjoyed a royal prerogative over these persons (*parens patriae*) and could declare himself to be guardian of the individual and of his estate. The King gave directions as to safekeeping. Thus began the practice of detaining individuals at the pleasure of the King. In 1800 an Act for Safe Custody of Insane Persons Charged With Offences was passed by the English Parliament to hold all persons acquitted by reason of insanity "in strict custody, in such place and in such manner as to the court shall seem fit, until His Majesty's pleasure shall be known." This Act formed the basis of s. 614(2) of the *Criminal Code*.

---

8. Holdsworth, *History of English Law*, 5th Ed., vol. 3 (London, Methuen and Company Ltd., 1942), p. 371.

In 1724 in England the trial judge instructed the jury in *R. v. Arnold* (1724), 16 Sd. Tr. 695, that they were not to find the accused insane if he was "able to distinguish whether he was doing good or evil... It must be a man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or wild beast." The two branches of the insanity test of s. 16(2) can be seen in this instruction - a total deprivation of understanding or reason and an inability to distinguish between good and evil. Subsequent cases focused on the origins of the second branch - the incapacity to discern good from evil: *Rex v. Ferrer* (1760), Parker's case (1812), Bellingham's case (1812), *Rex v. Bowler* (1812), Martin's case (1829) and Oxford's case (1831).<sup>9</sup> However, in 1840 the first branch regained prominence as the test for insanity. In that year Edward Oxford was acquitted by reason of insanity of attempting to assassinate Queen Victoria, after the trial judge had told the jury that:

The question is whether the prisoner was labouring under that species of insanity which satisfies you that he was quite unaware of the nature, character and consequences of the act that he was committing.<sup>10</sup>

Against this background, Daniel McNaghten was tried in 1843 for the murder of Edward Drummond, the Secretary to the English Prime Minister, Robert Peel. Medical evidence was called to support McNaghten's claim of insanity. The trial judge, Tindal, C.J. instructed the jury that the test for criminal responsibility was:

- i) whether or not McNaghten "had or had not the use of his understanding so as to know that he was doing a wrong or wicked act," and
- ii) whether he "was not sensible" at the time he committed the act that he was violating the laws both of God and of man.

The jury returned a verdict of not guilty by reason of insanity and McNaghten spent his remaining years confined to hospital. The public outcry over the acquittal led to a debate in the House of Lords on criminal responsibility and the defence of insanity. The House of Lords asked the Queen's Bench to review the law. The judges' answers formed the basis to the McNaghten Rule:

... that every man is presumed to be sane, and ... that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.<sup>11</sup>

The McNaghten Rule became entrenched in Anglo-American common law.

---

9. Platt and Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and its Subsequent Development in the United States and in Historical Survey", 54 Calif. Law Rev. 1227. See also Klinck, "Special Delusions in the Insanity Defence" (1983) 25 CLQ 458 @ 471, n. 40.

10. *Quen, supra*, p. 4.

11. McNaghten's case (1843), 10 Cl. & F. 200 @ 210, 8 E.R. 718.

## Canada

Prior to the enactment of the *Criminal Code* of Canada in 1893 there were few reported cases of trials where insanity was an issue. When it did arise, the McNaghten Rule was applied. At Louis Riel's trial of treason in 1885 the jury was instructed in the same words as the McNaghten Rule. The Manitoba Court of Queen's Bench dismissed the appeal and said that the insanity test of the McNaghten Rule was "the sound and correct rule of law on this subject": *R. v. Riel* (No. 2) (1885) 2 Man. L. Rep. 321 @ 345. In a separate trial Henry Jackson, who also participated in the Riel rebellion was found not guilty by reason of insanity. In *R. v. Dubois* (1890), Q.L.R. 203, a case of murder, the jury was instructed on the McNaghten Rule. The jury did not accept the insanity defence and convicted Dubois.

The Canadian *Criminal Code* received Royal Assent in July 1892 and came into effect on July 1, 1893. It was based on four sources:<sup>12</sup>

- i) the Draft Code framed by the Royal Commission in England and introduced in the House of Commons in 1880,
- ii) the 1877 edition of Stephen's *Digest of the Criminal Law*, (1877),
- iii) Burbidge's *Digest of the Criminal Law of Canada*, (1890), and
- iv) existing Canadian legislation.<sup>13</sup>

Section 11 of the *Criminal Code* codified the essence of the McNaghten Rules:

(1) No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such act or omission was wrong.

(2) A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

(3) Everyone shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

Section 11 differed from the McNaghten Rules in the following respects:

- i) the *Code* broadened the scope of the McNaghten Rules by using the word "appreciate" as a substitute for "knowing" in the phrase "know the nature and quality of the act";
- ii) the two tests for insanity were framed disjunctively in the McNaghten Rules, but conjunctively in the *Criminal Code*. In *R. v. Cracknell* [1931] O.R. 634, the

---

12. Parl. Deb. H.C. Volume I, 1892, @ 1312.

13. See Simon Verdun-Jones paper on the "Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979," 14 UBC Law Review 1 @ 17.

Ontario Supreme Court held that the draftsman made an error in the *Code* by using "and" instead of "or";

- iii) the McNaghten Rules were confined to persons suffering from a "disease of the mind." The *Code* added "natural imbecility";
- iv) the *Code* omitted the words "defective reason" found in the McNaghten Rules.

In 1954 the revised *Criminal Code* re-numbered the insanity section as s. 16 and made the following minor changes to the section which has remained without further change to the present time:

- i) s. 16(1) was added - "No person shall be convicted of an offence in respect of an act or omission on his part while he was insane";
- ii) "the act" was changed to "an act" in s. 16(2);
- iii) the revised *Code* followed the judgment of *R. v. Cracknell, supra*, and made the two tests for insanity in s. 16(2) disjunctive.

The 1956 McRuer Report from the Canadian Royal Commission on the Law of Insanity concluded that the statutory provision for the test of insanity found in s. 16 should remain virtually the same but did recommend the repeal of s. 16(3) as it added nothing additional to the test found in s. 16(2).



### III. ANALYSIS OF SECTION 16

---

#### Section 16(1):

**No person shall be convicted of an offence in respect of an act or omission on his part while that person was insane.**

This subsection codifies the principle that insane persons are not responsible for their actions and are not to be punished. This principle was expressed long ago by Hawkins in *Pleas of the Crown* (2nd ed.) (1724) @ page 1:

The Guilt of offending against any Law whatsoever, necessarily supposing a wilful Disobedience can never justly be imputed to those, who are either incapable of understanding it, or of conforming themselves to it.

#### Section 16(2):

**For the purposes of this section, a person is insane when the person is in a state of natural imbecility or has disease of the mind to an extent that renders the person incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.**

This subsection provides four different ways to establish insanity:

- i) natural imbecility to an extent that renders the accused incapable of appreciating the nature and quality of his act or omission;
- ii) natural imbecility to an extent that renders him incapable of knowing that an act or omission is wrong;
- iii) disease of the mind to an extent that renders him incapable of appreciating the nature and quality of his act or omission;
- iv) disease of the mind to an extent that renders him incapable of knowing that an act or omission is wrong.<sup>14</sup>

An individual relying on s. 16(2) must first establish that he is in a state of "natural imbecility" or has a "disease of the mind." It is a question of law for a judge to determine "... what mental conditions are within the meaning of that phrase (disease of the mind) and whether there is any evidence that an accused suffers from an abnormal mental condition comprehended by that term."<sup>15</sup> If there is evidence, it is then left to the jury to determine whether the accused in fact was suffering from abnormality when the criminal act was committed.

---

14. Dyer, "The Insanity Defence: The Law Reform Commission's Proposals" (1983) 21 U.W.O.L.R. 265 @ 269.

15. *Cooper v. The Queen* (1980) 51 CCC (2d) 129 (SCC) 143.

"Natural imbecility" and "disease of the mind" are legal terms which are no longer used by the medical profession. It was not until the 1800's that medical evidence was first introduced at criminal trials on the question of insanity.<sup>16</sup> It was only when the field of psychiatry developed in the 19th century and claimed it could detect signs of madness not seen by the untrained eye that medical evidence became an important part of the insanity defence.<sup>17</sup> The interrelationship of medical evidence and legal definition is found in the following passage from the judgment of Martin, J.A. in *R. v. Rabey* (1977), 37 CCC (2d) 461 (OCA) 473:

The legal or policy component (in "disease of the mind") relates to (a) the scope of the exemption from criminal responsibility to be afforded by mental disorder or disturbance, and (b) the protection of the public by the control and treatment of persons who have caused serious harms while in a mentally disordered or disturbed state. The medical component of the term, generally, is medical opinion as to how the mental condition in question is viewed or characterized medically...

It is for the judge to determine what mental conditions are included within the term "disease of the mind," and whether there is any evidence that the accused suffered from an abnormal mental condition comprehended by that term. The evidence of medical witnesses with respect to the cause, nature and symptoms of the abnormal mental condition from which the accused is alleged to suffer, and how that condition is viewed and characterized from the medical point of view, is highly relevant to the judicial determination of whether such a condition is capable of constituting a "disease of the mind." The opinions of medical witnesses as to whether an abnormal mental state does or does not constitute a disease of the mind are not, however, determinative, since what is a disease of the mind is a legal question: see *R. v. Kemp*, *supra*, at p. 406; *R. v. O'Brien*, *supra* at pp. 292-3 CCC, p. 69 DLR; *R. v. Cottle*, *supra*, at pp. 1028-9; *R. v. Joyce* [1970] SASR 184 at p. 194.

### "Natural Imbecility"

It is thought that the *Criminal Code*'s addition of "natural imbecility" to the McNaghten Rule was due to the influence of Sir James Stephen who believed that a "defective mental power" should also excuse criminal conduct.<sup>18</sup> Glanville Williams believes that the McNaghten Rule did not specify "natural imbecility" because it was included within the words "... ground of insanity."<sup>19</sup> Given the court's broad interpretation of the second term "disease of the mind," "natural imbecility" is not relied on very often.

In Dubin, J.A.'s dissenting judgment in *R. v. Cooper*, (1978) 40 CCC (2d) 149 (OCA) @ 159, the term "natural imbecility" was considered separately from "disease of the mind" and defined as an "... imperfect condition of mental power from congenital defect or natural decay as distinguished from a mind once normal which has become diseased."

- 
16. Verden-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979," 14 UBC Law Review 1 @ page 4.
  17. *Ibid*, p. 8.
  18. Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979," 14 UBC Law Review 1 @ page 23.
  19. Williams, *Textbook of Criminal Law*, (1978) p. 603.

## "Disease of the Mind"

Sir Owen Dickson has suggested that the words "disease of the mind" were chosen by the judges in *McNaghten's Case* because they had the widest possible meaning and were "... intended to do no more than to exclude drunkenness, and transient psychological disturbances due to faults which are common to mankind, such as, for example, conditions produced by extreme anger."<sup>20</sup>

This broad interpretation is found in Dickson, J.'s definition in *Cooper v. The Queen*, (1980), 51 CCC (2d) 129 (SCC) 144:

In summary, one might say that in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.

In *Bratty v. A.G. for Northern Ireland* [1963] A.C. 386, Lord Denning suggested that a mental disorder, other than a psychosis which was clearly recognized as a disease of the mind, which is non-recurring is not a disease of the mind:

It seems to me that any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.

The Canadian courts have not placed this limitation on the definition: *R. v. Parnekar* (1972), 5 CC (2d) 11 (Sask. C.A.), *R. v. Rabey* (1977), 37 CCC (2d) 461 (OCA).

The term "disease of the mind" is considered to have flexibility as it allows the trial judge in each case to balance the competing interests of the protection of society and the degree to which mentally disordered persons should be held criminally responsible.<sup>21</sup> As Martin, J.A. said in *R. v. Rabey*, *supra* @ 473:

Since the medical component of the term reflects or should reflect the state of medical knowledge at a given time, the concept of "disease of the mind" is capable of evolving with increased medical knowledge with respect to mental disorder or disturbance.

At one time a psychopathic personality (sociopathy, personality disorder, character disorder) was not considered a disease of the mind but has now been recognized as such: *A.G. Northern Ireland v. Gallagher* [1963] AC 349 @ 382, *R. v. Borg* [1969] 4 CCC 262 @ 269-70 (SCC), *Chartrand v. The Queen* (1975) 26 CCC (2d) 417 (SCC) @ 420, *R. v. Simpson* (1977) 35 CCC (2d) 337 (OCA) @ 350, *R. v. Rafuse* (1981), 53 CCC (2d) 161 (BCCA).

Rogers and Turner point out in their 1987 paper, "Understanding of Insanity: A National Survey of Forensic Psychiatrists and Psychologists" that the vast majority of forensic psychiatrists and psychologists have little understanding of the legal test of insanity.<sup>22</sup>

---

20. *R. v. Rabey* (1977), 37 CCC (2d) OCA 461 @ 476, per Martin, J.A. referring to "A legacy of Hadfield, McNaghten and McLean" 31 Aust. L.J. 255 @ 260 by the Right Honourable Sir Owen Dickson.

21. Martin, J.A., "Mental Disorder and Criminal Responsibility in Canadian Law" p. 15 @ 16 in Hucker and Webster, "Mental Disorder and Criminal Responsibility" (Toronto).

22. (1987) 7 Health L. Can. 71.

A 1989 report on patients being held under Lieutenant-Governors' warrants showed that the most common mental disorders among detainees were: schizophrenia (65.3%), personality disorders (11.9%), affective disorders (7.6%), delusional paranoid disorders (6.9%), and mental retardation (4.2%). Only 0.2% of the patients were found to have "no diagnosis."<sup>23</sup>

It has been the emergence of the automatism defence (conscious and voluntary behaviour) that has focused attention on finding a satisfactory definition for "disease of the mind." The distinction between insane and non-insane automatism has far-reaching consequences for the accused:

Automatism caused by disease of the mind is subsumed under the defence of insanity leading to the special verdict of not guilty on account of insanity, whereas automatism not resulting from disease of the mind leads to an absolute acquittal, unless induced by voluntary intoxication due to the consumption of alcohol or drugs, or unless foreseeability or foresight with respect to its occurrence supplies the necessary element of fault, or *mens rea*, where negligence or recklessness constitutes a basis of liability...

In general, the distinction to be drawn is between malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some specific external factors such as, for example, concussion. Any malfunction of the mind, or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not), may be a "disease of the mind" if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind.

Martin, J.A. in *R. v. Rabey* (1977) 37 CCC (2d) 461 @ 472, 477-8 24

### **First Branch of Section 16(2) - Incapable of Appreciating the Nature and Quality of an Act or Omission**

In most trials the crucial issue is not the first hurdle, whether there is "natural imbecility" or "disease of the mind" but rather the second hurdle, whether the abnormality "rendered the person incapable of appreciating the nature and quality of the act or of knowing that it was wrong." Of the two branches under s. 16(2) most trials tend to focus on the question of whether the accused had the capacity to appreciate the nature and quality of his act. Perhaps that is because a plea of insanity is most often raised on a charge of murder, a "result crime," where the issue generally is the accused's appreciation of the consequences of his act.

- 
23. Hodgins et al, Annual Report, Year 1, Canadian Database: Patients Held on Lieutenant-Governors' Warrants (1989), Table 5, "A Description of Patients under Lieutenant-Governor's Warrant, March 1, 1988."
  24. See also, *R. v. MacLeod* (1980), 52 CCC (2d) 193 (BCCA), *R. v. Fournier* (1982), 70 CCC (2d) 351 (QCA), *R. v. Oakley* (1986), 24 CCC (3d) 351 (OCA).

## "Appreciate"

The significant difference between the McNaghten Rule and the *Criminal Code* is that the Rule used the phrase "knows the nature and quality of his act" and the *Code* uses "appreciating the nature and quality of an act." The *Code*'s test is much broader. It is not limited to defective reason which is so narrow that few are hardly ever really mad enough to fall within it.<sup>25</sup> No other Anglo-American jurisdiction uses the word "appreciate."<sup>26</sup> As Dickson, J. stated in *Cooper v. The Queen* (1980) 51 CCC (2d) 129 (SCC) @ 145-6:

In contrast to the position in England under the McNaghten rules, where the words used are "knows the nature and quality of his act," section 16 of the *Code* uses the phrase "appreciating the nature and quality of an act or omission." The two are not synonymous. The draftsman of the *Code*, as originally enacted, made a deliberate change in language from the common law rule in order to broaden the legal and medical considerations bearing upon the mental state of the accused and to make it clear that cognition was not to be the sole criterion...

To "know" the nature and quality of an act may mean merely to be aware of the physical act, while to "appreciate" may involve estimation and understanding of the consequences of that act. In the case of the appellant, as an example, in using his hands to choke the deceased, he may well have known the nature and quality of that physical act of choking. It is entirely different to suggest, however, that in performing the physical act of choking, he was able to appreciate its nature and quality in the sense of being aware that it could lead to or result in her death...

Our *Code* postulates an independent test, requiring a level of understanding of the act which is more than mere knowledge that it is taking place; in short, a capacity to apprehend the nature of the act and its consequences ... The test proposed in the McRuer Report, which I would adopt (save for the deletion of the word "fully" in the fourth line), is this (p. 13):

The true test necessarily is, was the accused person at the very time of the offence - not before or after, but at the moment of the offence - by reason of disease of the mind, unable (fully) to appreciate not only the nature of the act but the natural consequences that would flow from it? In other words was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act?<sup>27</sup>

## "Nature and Quality of an Act"

The "nature" and the "quality" refer to different aspects of the act but are generally used interchangeably. "Nature" refers to the physical character of the act: *R. v. Cracknell* [1931] O.R. 634 (OCA); "quality" refers to the physical consequences of the act: *R. v. Codere* (1916) 12 Cr. App. R. 21, *R. v. Harrop* (1940), 74 CCC 228 (M.C.A.), *R. v. Cook* (1979), 1 Sask. R. 273, *R. v. Barnier* (1980) 51 CCC (2d) 193 (SCC).

---

25. Baron Bramwell quoted by G.A. Martin in "Insanity as a Defence" (1965-6), 8 Crim. L.Q. 240 @ 243.

26. *R. v. Cooper* (1980) 51 CCC (2d) 129 @ 147.

27. See also *R. v. O'Brien* [1966] 3 CCC 288 @ 301-2 per Ritchie, J. and *R. v. Simpson* (1977) 35 CCC (2d) 337 (OCA) @ 355, per Martin, J. for similar formulations of the first branch test.

A delusion which renders an accused incapable of appreciating the penal consequences of his act is not covered by this section: *R. v. Abbey* (1982), 68 CCC (2d) 395 @ 403-4.

In *Cooper v. The Queen*, *supra*, Dickson, J. suggested that the ability to appreciate the emotional consequences of an act was included in the words "nature and quality of an act":

Emotional, as well as intellectual, awareness of the significance of the conduct, is in issue.

*Cooper v. The Queen*, *supra*, @ 145

However the following year McIntyre, J., speaking for a unanimous court in *Kjeldsen v. The Queen* (1981), 24 CR (3d) 289 disagreed. The Supreme Court of Canada agreed with the trial judge's charge to the jury when he said:

If he had an appreciative awareness of striking with a stone, that it might cause death or injury, that has brought us within the meaning of the section, regardless of what his emotional attributes might be, or regardless of what the emotional effect would be on the victim; one does not say that it changes the physical nature of the act one bit.

In Hugh Dyer's article on "The Insanity Defence"<sup>28</sup> he suggests the answer to the conflict between these two leading authorities may be found in the following passage from an article by Martin, J.A. on "Mental Disorder and Criminal Responsibility in Canadian Law":

Capacity to appreciate the nature and quality of the act, or to know it is wrong does not, however, import a requirement of capacity to have appropriate feeling for the victim. A defendant may have the necessary capacity to appreciate the nature and quality of the act or to know that it is wrong notwithstanding that he lacks appropriate feeling for the victim or appropriate feelings of remorse. That is not to say that the absence of appropriate affect is devoid of significance. Indeed, it may be a symptom of serious mental illness of such a nature as to deprive the defendant of the necessary capacity at the critical time to appreciate the nature and quality of the act or to know that it is wrong. Mere lack of appropriate feeling by itself at such time, however even when due to a disease of the mind, does not exculpate.<sup>29</sup>

## **Second Branch of Section 16(2) - Incapable of Knowing that an Act or Omission is Wrong**

Even if the first branch of s. 16(2) were not satisfied because the accused was capable of appreciating the nature and quality of an act, the insanity plea might still succeed if the accused was incapable of knowing his act was morally wrong: *R. v. Chaulk* (1990) 62 CCC (3d) 1. The debate over whether "wrong" in s. 16(2) should be interpreted narrowly as meaning "legally wrong" or more broadly as meaning "morally wrong" has heated up in recent years with conflicting lines of authority in England, Australia and Canada.

---

28. Dyer, "The Insanity Defence: The Law Reform Commission's Proposals" (1983), 21 U.W.O.L.R. 265 @ 274.

29. Martin, J.A. "Mental Disorder and Criminal Responsibility in Canadian Law" p. 20 in Hucker and Webster, *Mental Disorder and Criminal Responsibility* (Toronto).

In *McNaghten's* case (1843), 8 E.R. 718 @ 722-723, Lord Chief Justice Tindal stated:

... to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defective reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong ... If the accused was conscious that the act was *one which he ought not to do*, and if that act was at the same time contrary to the law of the land, he is punishable ...

The English Court of Appeal in *R. v. Codere* (1916), 12 Cr. App. R. 21 and *R. v. Windle* [1952] 2 Q.B. 826 decided that the word "wrong" in the McNaghten Rule meant "legally wrong" so that if a person knew that the act which he was committing was against the law but by reason of insanity thought that in the circumstances the commission of the act was morally right he was not exempt from criminal liability.<sup>30</sup> An example from Sir James Stephen's *History of the Criminal Law of England* illustrates the importance of the meaning of "wrong" in certain cases:

A kills B knowing that he is killing B, and knowing that it is illegal to kill B, but under an insane delusion that the salvation of the human race will be obtained by his execution for the murder of B, and that God has commanded him (A) to produce that result by these means. A's act is a crime if the word "wrong" means illegal. It is not a crime if the word "wrong" means morally wrong.<sup>31</sup>

Other similar examples are given by Dickson, J. in a dissenting judgment in *Schwartz v. The Queen* (1976) 29 CCC (2d) 1 @ 21 and can be seen in the facts of *Ratti v. The Queen* (1991) 62 CCC (3d) 105 (SCC) and *R. v. Landry* (1991) 62 CCC (3d) 117 (SCC).

In Australia in *Stapleton v. The Queen* (1952), 86 CLR 358 @ 367, Dickson, C.J. for the court rejected the narrow definition of "legally wrong":

The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense or composure it may be said that he could not know that what he was doing was wrong.

In Canada the McRuer Report (1956) recommended a broad meaning for "wrong", "not only in the legal sense but something that would be condemned in the eyes of mankind."<sup>32</sup> Twenty years later in *Schwartz v. The Queen* (1976), 29 CCC (2d) 1 @ 11 by a majority of 5 to 4 the Supreme Court of Canada chose to follow the thinking in *R. v. Codere*, *supra*, over that of *Stapleton v. The Queen* by holding that "wrong" in s. 16(2) means nothing more than to know that what one was doing was against the law.

---

30. Martin, J.A., "Insanity as a Defence", (1965-66) 8 CLQ 240 @ 247.

31. Stephen, *History of the Criminal Law of England* (1883), Vol. II, p. 149.

32. Royal Commission on the Law of Insanity as a Defence in Criminal Cases in Canada, (McRuer Report, 1956) p. 13.

In a strong dissent Dickson, J. said "wrong" meant "morally wrong." He emphasized that in 1843 when the McNaghten Rules were formulated the law dealt with insanity in terms of "rightness and wrongness" and "good and evil:"<sup>33</sup>

As Cardozo, J., stated in *People v. Schmidt* (1915), 216 N.Y. 324 @ p. 334:

There is nothing to justify the belief that the words right and wrong, when they became limited by *McNaghten's* case to the right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality.

Section 16(2) must be read in toto. One looks at capacity to reason and to reach rational decisions as to whether the act is morally wrong. If wrong simply means "illegal" this virtually forecloses any inquiry as to capacity. The question for the jury is whether mental illness so obstructed the thought processes of the accused as to make him incapable of knowing that his acts were morally wrong. The argument is sometimes advanced that a moral test favours the amoral offender and that the most favoured will be he who had rid himself of all moral compunction. This argument overlooks the fact of disease of the mind. If, as a result of disease of the mind, the offender has lost completely the ability to make moral distinctions and acts under an insane delusion, it can well be said that he should not be criminally accountable. Cardozo, J., in *People v. Schmidt*, *supra*, dealt with the problem of those who know an act is illegal and yet do not find it wrong, in these words, at p. 340:

It is not enough, to relieve from criminal liability, that the prisoner is morally depraved ... it is not enough that he has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind.

Dickson, J.'s dissent in *Schwartz v. The Queen*, *supra*, found approval in the majority judgment of the Supreme Court of Canada in *R. v. Chaulk* (1990) 62 CCC (3d) 193. Lamer, C.J. overruled the majority decision in *Schwartz* with respect to the meaning of "wrong." At page 231 of the judgment he states:

The test articulated in section 16(2) is directed, as emphasized above, at an analysis of the capacity of the accused to reason and to understanding the meaning of the terms "right" and "wrong," concepts that demand a moral judgment on the part of every individual in order to be applied in practice. It cannot be determined that an accused does not have the necessary capacity to engage in such moral reasoning simply because he or she does not have the simple ability to retain factual information, for example, the ability to know that a certain act is a crime in the formal sense.<sup>34</sup>

In the dissenting judgment in *R. v. Chaulk*, *supra*, McLachlin, J. takes the position that "wrong" in s. 16(2) "... ought to be interpreted simply in the sense of what one ought not to do, for whatever reason, legal or moral." She recognizes that such a test would have the practical effect of making criminally liable an accused who was capable of knowing

---

33. *Schwartz v. The Queen* (1976), 29 CCC (2d) 1 (SCC) 19-20, 22.

34. See also *Ratti v. The Queen* (1991) 62 CCC (3d) 105 (SCC), *R. v. Landry* (1991) 62 CCC (3d) 117 (SCC).



that his or her act was legally wrong, regardless of what his or her moral appreciation may have been.<sup>35</sup>

McLachlin, J. endorses the conclusion of Professor Mewitt in *Criminal Law* (2nd ed.) 1985 @ pp. 415-6:

With the greatest respect for judges who have wrestled with this problem and for academics who have written on it, in fact this is a non-problem ... the question that ought to be asked, it is submitted, is whether the accused, because of a disease of the mind (first hurdle) was rendered incapable (second hurdle) of knowing that this act was something that he ought not to do (third hurdle). If he was capable of knowing that the act was contrary to law and that he ought not to do an act contrary to law, then the defence should not apply. If he was incapable of knowing that it was contrary to law, but capable of knowing that it was an act condemned by people generally, then again the defence should not apply. But if he was incapable of knowing that the act was contrary to law *and* incapable of knowing that it was an act condemned by people generally, then the defence should apply. This only leaves a situation where he was capable of knowing that the act was contrary to law but incapable both of knowing that to act contrary to law was condemned by people generally *and* of knowing that this particular act was condemned by people generally. I would have thought that such an accused (who must be the rarest of all individuals) is precisely one who ought to be found not guilty by reason of insanity. Far from opening any floodgates, such an interpretation scarcely affects the number of persons who would have a valid defence, but on the rare occasion when it is relevant seems extremely important.

The question, it seems to me, is not whether the accused thought an act was morally wrong or legally wrong but whether he was incapable of knowing that he ought not to do it.

Eric Colvin points out in "Ignorance of Wrong in the Insanity Defence" that there is little difference between the two tests partly because:

"... the advocates of the view that the standard of wrongfulness is a moral one have opted for a test of knowledge of objective moral wrong. The issue is not whether a person is capable of feeling subjectively that his act is morally wrong, but whether he is capable of understanding that it is morally wrong according to prevailing social standards.<sup>36</sup>

### Section 16(2) - Cognitive, Conative or Emotional Test?

Section 16(2) has often been criticized for basing its test for insanity on cognition (understanding) while discounting the emotional and conative (volitional) aspects of the mind's operation. Dickson, J.'s attempt in *Cooper* to expand the cognitive test to emotional impairment was curtailed by the Supreme Court of Canada in *Kjeldsen*. Other attempts to expand the test to volitional impairment have also been curtailed.

Volitional inability to prevent oneself from acting, known as "irresistible impulse", has traditionally been rejected as a ground of insanity because of the difficulty in distinguishing an irresistible impulse from one that was simply not resisted.<sup>37</sup> In Canada

---

35. *R. v. Chaulk* (1990) 62 CCC (3d) 1 (SCC) @ 275.

36. Colvin, "Ignorance of Wrong and the Insanity Defence" (1981) 19 U.W.O.L.R. 1 @ 5.

37. Williams, *Textbook of Criminal Law* (1978) p. 601.

this position has now been somewhat relaxed by three authorities: in *R. v. Wolfson* (1965) 51 DLR (2d) 428 (Alta. C.A.), the court held that irresistible impulse was not a defence *per se*, but could be a manifestation of insanity; in *R. v. Borg* [1969] 2 CCC 114 (SCC) both majority and minority opinions recognized that irresistible impulse might be a symptom or manifestation of a disease of the mind which might give rise to a defence of insanity; in *R. v. Abbey* (1982) 68 CCC (2d) 394 (SCC) 406 Dickson, J. for a unanimous court adopted that position, referring to the following statement in Hall, J.'s dissent of *R. v. Borg*, *supra* @ 281-2:

When an accused pleads insanity there is a sense in which it is true to say that irresistible impulse of itself is not a defence. However, there are two senses in which it is not true to say that irresistible impulse of itself is not a defence.

There is no legal presumption of insanity merely from the existence of an irresistible impulse. If an accused presents no medical evidence of disease of the mind but merely pleads that he was acting under an irresistible impulse, a jury is not entitled to infer that the man was insane. In that sense irresistible impulse is not of itself a defence. However, if there is medical evidence of disease of the mind as there was here and yet the only symptoms of that disease of the mind are irresistible impulses, the jury may conclude that the accused is insane.

This passage is similar to Martin, J.A.'s comment in "Mental Disorder and Criminal Responsibility in Canadian Law" on emotional impairment noted above @ p. 19. While the cognitive test in s. 16(2) has not been extended to include either volitional impairment or emotional impairment, these manifestations might support a finding of insanity where there is evidence of disease of the mind. Martin, J.A.'s observations in *R. v. Simpson* (1977) 35 CCC (2d) 337 (OCA) 354 are instructive:

One of the most persistent criticisms of the McNaghten Rules is that they are based on an obsolete theory of psychology that the functions of the mind - understanding, willing and feeling - can be compartmentalized, whereas the human personality functions as an integrated unity. Serious mental illness impairs not only the cognitive function of the mind but also the will and the emotions. Professor Jerome Hall, one of the defenders of the McNaghten Rules, has said:

Although it is possible and it may sometimes be useful to distinguish them, the fact is that in normal persons the emotional, the cognitive and the conative functions inter-penetrate one another.

Hall, *General Principles of Criminal Law*, 2nd 3d., p. 494

The McNaghten Rules make defect of reason from disease of the mind which prevents the accused from knowing the nature and quality of the act or of knowing that it was wrong, the exclusive criterion of the kind or degree of insanity that exempts from criminal responsibility. The McNaghten Rules, however, do not deny the unity of the mind; that mental disorder impairs the will and the emotions or feelings. Nor that the cognitive function is not capable of being impaired by volitional and emotional factors. What the McNaghten Rules do say is that the end result produced by the disease of the mind must be a defective reason which prevents the accused from knowing the nature and quality of the act or that it was wrong: see "The Virtues of McNaghten," 51 Minn. L. Rev. 789 (1967), @ p. 823, by Joseph M. Livermore and Hall E. Meehl.

## Specific Delusions

### Section 16(3):

**A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused that person to believe in the existence of a state of things that, if it existed, would have justified or excused the act or omission of that person.**

This subsection was based on the fourth answer given by the Queen's Bench Judges to the House of Lords in *McNaghten's Case*. It was sometimes thought that s. 16(3) provided a separate and independent test for insanity that was not covered by s. 16(2). However that viewpoint is not supported by the authorities: *R. v. Chaulk* (1990) 62 CCC (3d) 193 (SCC) @ 235. Mewitt and Manning suggest that s. 16(3) owes its existence to the "... fallacious 19th century notion that a person can be sane in all respects except that he has an insane delusion. Presumably, such a person would now be considered either sane or insane."<sup>38</sup>

For this reason, the McRuer Report in 1956 recommended that s. 16(3) be repealed from the *Criminal Code*:

The preponderance of medical evidence condemned the wording of this subsection on the ground that it describes a person who could not exist. The opinion of these witnesses was that no one who has "specific delusions" could be "in other respects sane." We think that from a medical point of view the arguments put forward in support of this opinion are conclusive.<sup>39</sup>

A similar conclusion was reached by Dennis Klinck after an extensive analysis of s. 16(3) in his paper "Specific Delusions" in the *Insanity Defence* (1983) 25 C.L.Q. 458. Few authorities have considered s. 16(3) and its relationship to s. 16(2). In *R. v. Budic* (No. 3) 1978 43 CCC (2d) 419, the Alberta Court of Appeal held that where s. 16(3) could not provide an insanity defence (e.g. if the delusional facts had been true, they would not have constituted an excuse or justification) s. 16(2) might still be available. The judgment indicated that s. 16(2) covered a situation not included in s. 16(3) but did not consider the converse.<sup>40</sup> In *R. v. Abbey* (1982) 68 CCC (2d) 394 @ 405, the Supreme Court of Canada held that s. 16(3) does not add to or qualify the general defence under s. 16(2). Any lingering doubt about the utility of s. 16(3) was put to rest in *R. v. Chaulk*, supra @ 235 where Lamer, C.J.C. for the majority states:

In my view, it is not necessary for this court to engage in the difficult and perhaps impossible task of deciphering the plain meaning of section 16(3) or of fathoming the intention of Parliament in enacting the provision. As a result of this court's reconsideration of the meaning of the word "wrong" in section 16(2), there can be no doubt that any successful attempt to invoke the insanity defence under section 16(3)

---

38. Mewitt and Manning, *Criminal Law*, 2nd Ed. (Toronto), p. 255.

39. McRuer, Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1956), p. 36.

40. Klinck, "Specific Delusions in the Insanity Defence" (1983) 25 CLQ 458 @ 461.

would also succeed under section 16(2). Furthermore, if an accused fails to satisfy the conditions set out in section 16(2), he or she will not be able to benefit from section 16(3). It would not, therefore, assist an accused in any way if section 16(3) was indeed held to constitute a separate and independent defence.

## **Presumption of Sanity/Burden of Proof**

### **Section 16(4):**

**Everyone shall, until the contrary is proved, be presumed to be and to have been sane.**

A precondition of criminal responsibility or moral blameworthiness is the capacity for rational choice. Due to the difficulties in having the Crown prove in every case that the accused had that capacity, the criminal law presumes that persons are sane and responsible: *R. v. Chaulk* (1990) 62 CCC (3d) 1 (SCC) 219-223.

The formulation in s. 16(4) is based on the words of Lord Tindal, C.J. in *McNaghten's* case in (1843) 8 E.R. 718 (H.L.) @ 722:

The jurors ought to be told in all cases that every man has to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction ...

While earlier authorities differed with respect to the standard of proof required - *R. v. Anderson* (1914), 22 CCC 455 (Alt. C.A.) required a preponderance of evidence while *R. v. Keirstead* (1918), 30 CCC 175 (N.B.C.A.), required proof beyond a reasonable doubt - the issue has been settled since the Supreme Court of Canada decided in 1921 on a balance of probabilities test: *Clark v. The King* (1921) 35 CCC 261, *Smythe v. The King* [1941] SCR 17.

In "A Critique of Proposals to Reform the Insanity Defence," (1989) 14 *Queens L.J.* 135, Gerry Ferguson at page 148 reviews the "pragmatic considerations" in favour of keeping the persuasive burden on the accused. He lists those considerations and gives his comments:

- i) to reduce the likelihood of successful fabrication of the insanity defence;
- ii) a reasonable doubt about the accused's sanity can be created too easily;
- iii) proving the accused's sanity beyond a reasonable doubt is impossible.

Upon closer examination, these pragmatic considerations lack validity. The experience in the United States is particularly revealing. As of 1982, in half of the States and in all federal courts, once there is some evidence of insanity, the prosecution has the burden of proving the accused's sanity beyond a reasonable doubt. Does that burden allow a throng of fabricated insanity pleas to succeed? Does it put an intolerable or impossible burden on the Crown? I sampled the reported cases in those jurisdictions for the year 1982. In almost all of the cases there was at least some expert evidence supporting the accused's insanity plea. But in 28 of 30 cases, the defence of insanity failed. The Crown proved its case; the accused failed to raise a reasonable doubt. If anything, these figures suggest that even raising a reasonable doubt about insanity may be too difficult a standard to meet rather than one which is too facile. Incidentally, in jurisdictions where the accused

had the burden of proof on a balance of probabilities, the accused's insanity plea failed 16 times in 17 cases.

Nevertheless, the majority in *R. v. Chaulk, supra*, @ p. 222-3 accepted the balance of probabilities test and held that placing the burden of proof on the accused was a reasonable limit on the presumption of innocence (s. 11(d)) and could thus be upheld under s. 1 of the Charter:

The presumption of sanity and the reversal of onus embodied in section 16(4) exist in order to avoid placing a virtually impossible burden on the Crown. The burden on the accused is not the full criminal burden; rather, the accused is required to prove his or her insanity on a balance of probabilities. If an accused were able to rebut the presumption merely by raising a reasonable doubt as to his or her insanity, the very purpose of the presumption of sanity would be defeated and the objective would not be achieved. Any other means of achieving the objective could also give rise to violations of other Charter rights.

Section 16(4) represents an accommodation of three important societal interests: avoiding a virtually impossible burden on the Crown; convicting the guilty, and acquitting those who truly lack the capacity for criminal intent.

### Who Can Raise the Issue?

One of the most controversial questions over the past 16 years has been whether the Crown or court could raise the issue of insanity under s. 16 of the *Criminal Code* where the accused chose not to. The British practice has always been that only the accused had the right to raise this issue: *R. v. Smith* (1910) 6 Cr. App. R. 19. In giving judgment for the court in *R. v. Simpson, supra*, Martin, J.A. @ p. 360-2 rejected this principle but cautioned the Crown against introducing evidence of insanity to strengthen a weak case:

A rule which permits strong evidence of insanity to be withheld from the court at the option of the accused and thereby permit the conviction of a person who lacks capacity to commit the offence serves no genuine interest of society or the accused. Such a result not only does not accord with the requirements of justice, but is fundamentally wrong and in conflict with the basic principles of a criminal law which, in general, predicates liability upon fault ...

Where the prosecution seeks to adduce evidence that the accused was insane at the time of the act, the proper test, in my view, is not whether, if advanced by the accused, the evidence would be sufficient to require the defence of insanity to be submitted to the jury by the trial judge, but whether it is sufficiently substantial and creates such a grave question whether the accused had the capacity to commit the offence that the interest of justice requires it to be adduced.

The principle justification for the introduction of evidence by the Crown to establish a "defence" of insanity is to avoid the conviction of an accused who may not be responsible on account of insanity, but who refuses to adduce cogent evidence that he was insane. Such a situation is not likely to occur frequently.

The *Simpson* principle was followed a few years later in *R. v. Saxell* (1980) 59 CCC (2d) 176 (OCA) and broadened in *Cooper v. The Queen* (1980) 51 CCC (2d) 129 (SCC) to require the trial judge to charge the jury on the defence of insanity, if there is sufficient evidence, even though neither Crown nor defence raises the issue.

This principle has now been overturned by the Supreme Court of Canada in its recent decision, *Swain v. The Queen*, unreported, (May 2, 1991). The majority judgment, delivered by Lemar, C.J. found that the common law rule which allowed the Crown to raise evidence of insanity over and above the accused's wishes was a denial of liberty which was not in accordance with the principles of fundamental justice and not saved by s. 1 of the Charter. The majority judgment took the view that the decision whether or not to raise the issue of insanity was part and parcel of the conduct of an accused's overall defence.

*Swain v. The Queen* recognized that the *Simpson/Saxell* common law rule had two objectives:

- i) ... to avoid the conviction of an accused who may not be responsible on account of insanity, but who refuses to adduce cogent evidence that he was insane,<sup>41</sup> and
- ii) ... the protection of the public from presently dangerous persons requiring hospitalization.<sup>42</sup>

The court devised a new rule at pages 39-41 to accomplish those objectives without limiting the *Charter* rights of the accused:

The dual objectives discussed above could be met without unnecessarily limiting *Charter* rights if the existing common law rule were replaced with a rule which would allow the Crown to raise independently the issue of insanity only after the trier of fact had concluded that the accused was otherwise guilty of the offence charged. Under this scheme, the issue of insanity would be tried after a verdict of guilty had been reached, but prior to a conviction being entered. If the trier of fact then subsequently found that the accused was insane at the time of the offence, the verdict of not guilty by reason of insanity would be entered. Conversely, if the trier of fact found that the accused was not insane, within the meaning of section 16, at the time of the offence the conviction would then be entered.

Such a rule would safeguard an accused's right to control his or her defence and would achieve both the objective of avoiding a conviction of a person who was insane at the time of the offence and the objective of protecting the public from a person who may be presently dangerous. Of course, an accused would also be entitled, under this scheme, to raise his s. 7 right not to be found guilty if he was insane at the time of the offence. An accused would, if he chooses not to do so earlier, raise the issue of insanity after the trier of fact has concluded that he or she was guilty of the offence charged, but before a verdict of guilty was entered. This is consistent with the accused's right, under a criminal justice system, to force the Crown to discharge its full burden of proof on the elements of an *actus reus* and *mens rea* before raising other matters. However, this does not mean that the accused can raise insanity only after both *actus reus* and *mens rea* have been proven ... As I have stated earlier, and I think it useful to reiterate here, if during the course of the trial an accused raises evidence of mental impairment which (in the view of the trial judge) tends to put his or her mental capacity in issue, the Crown will be entitled to lead evidence of insanity and the trial judge will be entitled to charge the jury on the insanity defence within the meaning of section 16.

---

41. Martin, J.A. in *R. v. Simpson*, *supra*, p. 362.

42. *Swain v. The Queen*, p. 34.

#### IV. DIMINISHED RESPONSIBILITY

---

One concept of the doctrine of "diminished responsibility" is found in Scottish common law. It is explained in the following statement of Lord Justice-Clerk Alness in *H.M. Advocate v. Savage* (1923), J.C. 49 @ 50:

That there may be such a state of mind of a person, short of actual insanity, as may reduce the quality of the act from murder to culpable homicide, is, so far as I can judge from the cases cited to me, an established doctrine in the law of Scotland ... Formerly there were only two classes of prisoners - those who were completely responsible and those who were completely irresponsible. Our law has now come to recognize in murder cases a third class ... who while they may not merit the description of being insane, are nevertheless in such a condition as to reduce the quality of their act from murder to culpable homicide...

It is very difficult to put it in a phrase, but it has been put in this way; that there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amount to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility - in other words, the prisoner in question must be only partially accountable for his actions.

This principle was codified in the English *Homicide Act*, 1957 reducing murder to manslaughter because of the accused's substantially impaired mental state:

**(2) Persons suffering from diminished responsibility**

**(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from the condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.**

**(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.**

**(3) A person who but for this section would be liable, whether as principle or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.**

**(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.**

In his text, *The Criminal Law of Scotland*, G.H. Gordon suggests that the doctrine of diminished responsibility is not intended to affect criminal responsibility but rather to be used only in mitigation of sentence - to recognize that mental illness, short of insanity, can lower the degree of culpability:

There should be no more difficulty in saying that a man suffering, from some mental weakness or illness is entitled to a mitigation of sentence than saying that a man who acts under provocation is entitled to such a mitigation. In both cases the men are responsible and liable to conviction but in both cases there are mitigating circumstances. The doctrine of diminished responsibility is based ultimately on general humanitarian grounds. It exists because, as has been stated of provocation, the law shows a "tenderness to the frailty of human nature."<sup>43</sup>

Rather than having to sentence such a person for murder to a fixed penalty of life imprisonment, this statutory provision allows the English court to impose a lesser sentence for manslaughter, including custodial treatment in a mental institution.<sup>44</sup> The reason the English doctrine of diminished responsibility focuses on murder is because it alone carries a fixed penalty. For all other offences, the principle is not recognized, since the court can soften the blow on the mentally disturbed offender through the flexibility of its own sentencing procedures. Since introducing the principle of diminished responsibility in the *Homicide Act*, there have been very few insanity defences in England.<sup>45</sup> Most offenders suffering from mental disorder have been convicted of the lesser charge of manslaughter with the judge using his discretion under the Mental Health Act to impose a hospital order rather than a term of imprisonment.

There are many Canadian authorities that recognize the relevance of mental disorder, short of insanity, to specific intent. Shortly after the statutory introduction of "diminished responsibility" to the English *Homicide Act* (1957), the Supreme Court of Canada in cases of capital murder held that evidence of mental disorder falling short of the s. 16 requirement had a "direct bearing" on the question of whether the accused's murder was deliberate: *More v. The Queen* [1963] SCR 522, *R. v. Mitchell* [1964] SCR 471, *R. v. McMartin* [1965] 1 CCC 142 (SCC), *R. v. Boivin* (1970) 1 CCC (2d) 403 (SCC).

In *R. v. McMartin*, *supra*, p. 154-55 Ritchie, J. made the following statement:

Under all the circumstances, it appears to me that the evidence of Dr. Tyhurst, like that of the doctors in *R. v. More*, *supra*, might have caused the jury "to regard it as more probable that the accused's final act was prompted by sudden impulse rather than by consideration."

For these reasons I am of opinion that the evidence of Dr. Tyhurst should have been admitted ...

In my opinion, without the evidence of the appellant's mental history and condition, it cannot be said that all the circumstances bearing on the question of whether the murder was planned and deliberate have been passed upon by a jury...

---

43. Gordon, *The Criminal Law of Scotland*, (2nd ed.) Edinburgh (1978). p. 381-392.

44. Mewitt and Manning, *Criminal Law*, (2nd ed.) p. 261.

45. Westin and Turner, "Recent Legislative Approaches" in Hucker and Webster, *Mental Disorder in Criminal Responsibility* (Toronto) p. 12.



In *R. v. Mitchell*, *supra*, p. 474-75 Spence, J. said:

I am of the opinion that the judgments in these two cases (*More* and *McMartin*) have as to their ratio decidendi the principle that in determining whether the accused committed the crime of capital murder in that it was "planned and deliberate on the part of such person" the jury should have available and should be directed to consider all the circumstances including not only the evidence of the accused's actions but of his condition, his state of mind as affected by either real or imagined insults and provoking actions of the victim and by the accused's consumption of alcohol ...

This principle was followed in subsequent decisions dealing with first degree murder: *R. v. Kmatch* (1979) 9 CR (3d) 331 (Sask. C.A.), *R. v. Mahoney* (1979) 50 CCC (2d) 380 (Ont. C.A.), (1981) 67 CCC (2d) 97 (SCC); *R. v. Knuff* (1980) 52 CCC (2d) 523 (Alta. C.A.). It was also applied to trials of second degree murder: *R. v. Blackmore* (1967) 1 CRNS 286 (NSCA), *R. v. Meloche* (1975) 34 CCC (2d) 200 (QCA), *R. v. Browning* (1976) 34 CCC (2d) 200 (OCA), *R. v. Hilton* (1977) 34 CCC (2d) 206 (OCA), *R. v. Lechasseur* (1977) 38 CCC (2d) (Que. C.A.) 319. It has even been extended to other offences of specific intent: *R. v. MacDonald* (1975) 29 CCC (2d) 257 (SCC), a charge of robbery, *R. v. Rabey* (1977) 37 CCC (2d) 461 (OCA), a charge of causing bodily harm with intent to wound.

In *R. v. Wright* (1979) 48 CCC (2d) 334 (Alta. C.A.), a case of second degree murder, Prowse, J.A. makes the point that medical disorders short of insanity are relevant for the limited purpose of showing that an accused did not in fact form the requisite intent but cannot be used to show the accused lacked the capacity as that is a s. 16 issue:

I am of the opinion that a trial judge should not invite or direct a jury to treat as relevant on the issue of intent evidence adduced on the issue of insanity that related solely to the accused's capacity to form the requisite intent.<sup>46</sup>

In my view, in the absence of a finding of insanity, lack of intent cannot be based on a lack of mental capacity to form the requisite intent. For example, if the accused caused the death of a person by discharging a gun and the jury ruled out the defence of insanity, the jury would still have to consider whether the accused did the act with the requisite intent. If the Crown adduced evidence from which a jury could infer and did infer that the firing of the gun was accompanied by the requisite intent, the accused could not meet that case by raising a reasonable doubt about his mental capacity to form the requisite intent. He could, however, point to other evidence that raised a doubt as to whether he had the requisite intent.<sup>47</sup>

This is not to say that evidence which is relevant to the issue of insanity may not be relevant to other issues which arise in the trial. Evidence that is adduced on the issue of insanity may be relevant on the issue of intent, not for the purpose of showing that the accused did not have the capacity to form the intent but for the limited purpose of showing he did not in fact form the requisite intent.<sup>48</sup>

Although Justice de Grandpre's judgment for the Supreme Court of Canada in *Chartrand v. The Queen* (1976) 26 CCC (2d) 417 clearly rejects the doctrine of diminished

---

46. *R. v. Wright* (1979), 48 CCC (2d) 334-344.

47. *Ibid.*, p. 345.

48. *Ibid.*, p. 346. See also Jordan, "Diminished Capacity" (1982-3) 25 CLQ 481.

responsibility in Canada, evidence of mental disorder short of insanity continues to be admitted on specific intent offences as part of the modern approach of putting all the relevant circumstances on the issue of intent before the trier of fact. That such a practice will be permitted to continue on a charge of murder is clear from *obiter* in *Swain* where Lamer, C.J. states @ p. 41:

However, if such evidence of mental impairment is, in the view of the trier of fact, insufficient to meet the requirements of section 16, the accused is still entitled to have such evidence considered with respect to the essential element of *mens rea*. This accords with the current practice wherein an accused has been able to deny the element of planning and deliberation or the specific intent required for murder despite the fact that section 16 has not been satisfied.<sup>49</sup>

Given the new common law rule enunciated in *Swain v. The Queen, supra*, for holding a hearing on the issue of insanity only after the *actus reus* and *mens rea* have been proven (p. 41), except where the accused wishes to raise it during the trial of the offence, some of the confusion over the purpose of psychiatric evidence on mental disorder will be removed and the principle of diminished responsibility might become more accepted in Canadian criminal law - at trial the evidence of mental disorder will be relevant to *mens rea* and on a subsequent insanity hearing it will be relevant to capacity.

---

49. See Walsh's paper on "The Concepts of Diminished Responsibility in Cumulative Intent: a Practical Perspective" (1991) 33 C.L.Q. 229 where he strongly argues that there is no such defence known as "diminished responsibility" in Canada.

## V. LAW REFORM COMMISSION PROPOSAL

---

### CANADA

#### Law Reform Commission - Working Paper #31 (1987)

##### Section 3(6) Mental Disorder:

No one is liable for his conduct if, through disease or defect of mind, he was at the time incapable of appreciating the nature, consequences or legal wrongfulness of such conduct [or believed what he was doing was morally right].

##### Observations:

1. The Law Reform Commission recommends keeping an insanity defence in the Draft Code for the following reasons:
  1. the insanity defence is rooted in tradition, authority and experience,
  2. it has been universally accepted in western countries,
  3. whatever the position adopted by the law, psychiatry will still bring forward evidence with which the courts will have to deal,
  4. the defence of insanity rests on the fundamental moral view that insane persons are not responsible for their actions and are not therefore fit subjects for punishment.<sup>50</sup>

Gerry Ferguson's comment on this point is worth noting:<sup>51</sup>

Likewise, any proposal to abandon this insanity defence and rely solely on the absence of *mens rea* as a defence must also be rejected as essentially immoral since it would result in the conviction and punishment of some persons who could not reason or choose right from wrong. An insane person, particularly a psychotic person who has delusions, may have *mens rea* in the strict sense for example, an intent to kill, but it is a *mens rea* concocted in an irrational mind. For one who is insane the normal controls, beliefs and perceptions of reality which influence the right-minded citizen are absent or impaired. Thus the capacity to reason or choose are impaired even though *mens rea* in the narrow sense exists.

2. The Commission chooses to streamline the four subsections of s. 16 of the *Criminal Code* into one clause which redefines s. 16(2) as mental disorder.

---

50. Law Reform Commission Working Paper #29.

51. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 *Queens L.J.* 135 @ 140.

3. The other three subsections of s. 16 are dealt with in the following manner - s. 16(1) is not restated; s. 16(3) is abolished because it was seldom used and no longer fit in with modern medical science; s. 16(4) is left for the evidence provisions of the Draft Code.
4. Reference to the word "insanity" has been replaced by "mental disorder" because the Commission felt that term was more in line with modern medical and social attitudes. Ferguson advances the following two reasons for retaining the word "insanity":
  1. the term insanity, which has been used for a long time, is quite familiar to the public and it conveys the fact that mental impairment must be quite severe because it constitutes "insanity" whereas the term "mental disorder" does not convey that same meaning since it is often used to describe minor as well as major impairment;
  2. since "insanity" is not a word in current medical use, this helps to emphasize that the issue is not a medical one for mental health professionals to decide, but a moral one for the judge or jury to decide; the words "mental disorder" might invite a greater medical usurping of the issue; the insanity defence is a legal construct and therefore requires a definition that suits its legal purposes; changing the word "insanity" to "mental disorder" in no way lessens the difficulties of determining who should be excused from criminal liability by reason of mental illness.<sup>52</sup>
5. The words "act or omission" in s. 16(2) are replaced by "conduct."
6. The formulation begins by using the words "No one is liable for his conduct ..." In Working Paper #29 the formulation began with the words "Everyone is exempt from criminal liability ..." This second phrase might be more useful in characterizing mental disorder as an exemption from criminal liability rather than as an excuse or justification. Both majority and minority decisions in *R. v. Chaulk* (1990) 62 CCC (3d) 193 view insanity as an exemption - that the accused is removed from the criminal process because of his mental disability.
7. In s. 16(2) the nexus between "disease of the mind" and the two branches of "appreciating" and "knowing" are provided by the words "... to an extent that renders ..." The Commission replaces that phrase by "through."
8. The term "natural imbecility" in s. 16(2) is replaced by "defect of the mind." The Commission made this change to cover mental malfunction due to mental retardation which they consider may not have been included under "natural imbecility" or "disease of the mind."<sup>53</sup> Black's Law Dictionary defines "defect" as "the want or absence of something necessary for completeness for perfection; ... a deficiency in something essential to the proper use for the purpose for which a thing is to be used."

---

52. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 *Queens L.J.* 135 @ p. 137.

53. Law Reform Commission, Working Paper #29, p. 45.

Ferguson thinks "defect of the mind" has a dehumanizing ring to it and suggests the term "mental disability" as used in the s. 15 equality provisions of the *Charter*.<sup>54</sup>

9. The Commission retains "disease of the mind" in its definition of mental disorder for the following two reasons:
- i) it emphasizes that in law the question of insanity is ultimately one not for doctors and psychiatrists but for judges and juries,
  - ii) it enables a clear line to be drawn between sane and insane automatism.<sup>55</sup>

The Commission leaves the term "disease of the mind" undefined because:

- i) the term is well known, explained in the case-law and understood by the profession,
  - ii) the impossibility of foreseeing all the developments and future directions of expertise on this topic cautions against putting the concept in a strait-jacket.<sup>56</sup>
10. The term "nature and quality" of an act or omission is replaced by "nature and consequences" of the conduct in accordance with the Supreme Court of Canada's interpretation in *R. v. Barnier*, (1980) 51 CCC (2d) 193, *Cooper v. The Queen* (1980) 51 CCC (2d) 129, *Kjeldsen v. The Queen* (1982) 24 C.R. (3d) 289. The definition of "consequences" is left to common law which at present restricts it to physical consequences: *Kjeldsen v. The Queen*, *supra*.
11. The formulation continues to use the word "incapable" as a threshold test for insanity which is consistent with the majority and minority judgments in *R. v. Chaulk* (1990) 62 CCC (3d) 193, where the focus is on the incapacity of the person to form criminal intent under s. 16(2).
12. The Commission unifies the two branches of s. 16(2) by using "appreciating" as the cognitive test for both "nature, consequences" of the conduct and "legal wrongfulness" of the conduct. The second branch of s. 16(2) will be broadened if "appreciating" is interpreted according to present case-law:

The verb "know" has a positive connotation requiring a bare awareness, the act of receiving information without more. The act of appreciating, on the other hand, is a second stage in a mental process requiring the analysis of knowledge or experience in one manner or another.

*R. v. Barnier*, per Estey, J. @ 202-3.

---

54. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 *Queens L.J.* 135 @ p. 137.

55. Law Reform Commission, Working Paper #29, p. 46.

56. *Ibid*, p. 46.

13. The majority of the Commission chooses to define "wrong" as "legally wrong" in accordance with *Schwartz v. The Queen* (1977) 34 CRNS 138. In Working Paper #29, the Law Reform Commission at page 47 made this comment:

One argument for this interpretation of "wrong" as "legally wrong" is as follows. A test framed in terms of knowing that an act is morally wrong is only workable as long as there are clear notions of right and wrong agreed upon by all. Without such general agreement, however, which cannot necessarily be taken for granted today in Canada, as witness the division of opinion over abortion (or euthanasia as noted by McLachlin, J. in *Chaulk*), such a test may land us in a quicksand of subjectivity where a defendant could plead that according to his morality his act was right. This quicksand can be avoided by a more objective test based on knowing that an act is "legally wrong."

A minority of the Commission would replace the words "... or legal wrongfulness of such conduct" with "... or believed what he was doing was morally right." The reason for doing so appears in the following comment from Working Paper #31 @ p. 33.

To them (Commission minority) it seemed that although in general a person cannot be allowed to substitute his views of right and wrong for those contained in the law, nevertheless a mentally disordered person who acts as he does because he thinks it morally right to do so, merits treatment rather than punishment. The words in brackets were drafted to allow for this but at the same time to prevent exemption for the psychopath, who acts as he does not because he thinks it right to do so, but rather because he is indifferent to right and wrong.

14. The Canadian Association of Chiefs of Police submitted that the Law Reform Commission's minority alternative ("or believed what he was doing was morally right") should be rejected for the following reasons:
- i) a subjective defence could easily preclude the discretion as to how harmful conduct is sanctioned after a finding of guilt,
  - ii) it may become available to an accused suffering from a wider range of maladies than is now the case because of the more general wording which would result in fewer convictions than before and a greater number of dispositions by way of mental disorder,
  - iii) it might create an absolute defence to the charge, with the disposition of "not guilty by reason of insanity" being replaced by simply "not guilty."

15. The formulation is restricted to impairment of cognitive capacity. The Commission chooses not to expand the definition to defective will (*i.e.* irresistible impulse). In Working Paper #29, the Commission stated at p. 44-45:

The matter of defective will, however, is no easy one for criminal law. In theory there is general agreement that the definition of mental disorder should address itself to the whole human personality. In practice, though, there may be problems, and the large body of informed opinion is opposed to catering to impaired volition. One reason for such opposition is the risk that psychopaths may be too easily acquitted. Another is the fear that psychiatric evidence may gain undue weight and confuse the jury. Yet another is the feeling that the present interpretation of section 16, which does not wholly exclude the situation of the psychopath, is as far as the law should go.

16. The Commission fails to deal with two issues of considerable importance - diminished responsibility and the Crown's right to raise insanity.

**Law Reform Commission Proposal - Working Paper #29 (1982), Mental Disorder**

	<b>(Alternative #1)</b>	<b>(Alternative #2)</b>
<b>Section 5</b>	Everyone is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he was incapable of appreciating the nature, consequences, or unlawfulness of such conduct.	Everyone is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law.

**Observations:**

1. Alternative #1 proposed in 1982 is similar to the formulation of s. 3(6) in Working Paper #31 (1987) with some minor differences in wording.
2. Alternative #1 characterizes "mental disorder" as an exemption from criminal liability.
3. Alternative #2 differs significantly from the formulation of s. 3(6) in Working Paper #31 in two respects:
  - i) "wrong" is defined as "morally wrong,"
  - ii) the term "lacked substantial capacity" is used rather than "incapable."

This formulation seeks to include those who are suffering from diminished responsibility. It might be interpreted to cover impaired control, not just impaired understanding. Alternative #2 is similar to s. 4.01 of the U.S. Model Penal Code (1962).<sup>57</sup> In Working Paper #29 the Law Reform Commission at pages 52-54 gives the following comment in support of Alternative #2:

This alternative would widen existing law. Under existing law, based as it is on 19th-century "intellectualist" notions of free will, insanity is restricted to impairment of understanding. This alternative, which takes account of modern insights into human behaviour, would extend the defence to impairment of self-control.

---

57. *Infra*, p. 46.



This extension can be supported by several reasons. First since the days when the M'Naghten tests were formulated, there has been growing recognition of the fact that mental disorder has not only a cognitive but also a conative aspect. Second, because of this, various jurisdictions have made provision for diminished responsibility (see the *English Homicide Act 1957*, s. 2). Third, there is the analogy with provocation - why should liability be reduced by provocation but not by diminished responsibility when both consist in impairment of capacity for self-control? Finally, there is the actual practice of our courts: while diminished responsibility has been repeatedly excluded by the Supreme Court of Canada, it has been indirectly recognized by Appeal Courts as being a factor relevant to *mens rea* and distinct from insanity. The Draft's approach, therefore, is in line with modern psychological thought, recent developments elsewhere and actual Canadian court practice.

Present practice in this regard, however, is less than wholly satisfactory. While lack of understanding leads to full acquittal subject to a special verdict and committal under *Cr.C.* s. 16 and s. 542, impaired control at the most leads only to a reduction of the charge. So, a person suffering from impaired understanding may be completely acquitted of a charge of murder, whereas a person suffering from impaired control may at best be acquitted of murder but convicted of manslaughter or some lesser offence on the ground that his impairment only prevented him from having the requisite *mens rea* for the full offence.

Such practice is unsatisfactory in at least two respects. First, it puts less emphasis on the moral grounds for criminal responsibility than on the legal definition of the offence alleged. Second, it means convicting, albeit for lesser crimes, those suffering from mental disorder and needing treatment rather than punishment.

For this reason this alternative brings so-called diminished responsibility under the umbrella of mental disorder. Defendants suffering from impairment of control will be dealt with on the same footing as those suffering from impaired understanding. Instead of being convicted of a lesser offence they will be formally acquitted, subject to a special verdict and committal under *Cr.C.* s. 542.

Under alternative (2), it should be noted, the psychopath (or sociopath) presents no greater and no lesser problem than under present law. Examination of forensic evidence suggests that psychopaths can roughly be divided into three categories. Those merely lacking feelings of guilt, remorse or concern for others do not receive special treatment either in present law or under this alternative. Those suffering from mental disorder resulting in lack of control may under present law lack *mens rea*, as described above, and may under this alternative be acquitted by reason of mental disorder. Those suffering from mental disorder leading to lack of understanding may, under present law and under this alternative, be acquitted by reason of mental disorder.

The addition of the words "substantial capacity to conform to the requirements of the law" has several effects. First, it extends the defence of mental disorder to cases of lack of capacity for self-control. Second, it stresses that the question is ultimately a normative one, to be determined by the jury. Third, it emphasizes that standards set by criminal law are not to be applied to people whose mental abnormality deprives them of understanding or self-control. Finally, it is nevertheless not meant to render irresistible impulse (see above) a defence in itself any more than it is under present law but only to render it a factor to be taken into account as symptomatic of disease of mind impairing capacity to conform to law.

Critics of Alternative #2 suggest that it might result in an unjustified expansion of the insanity provision to include chronic offenders and psychopaths. Ferguson believes that Alternative #2 "... may be more appropriate from a moral or philosophic perspective, but that its implementation is impossible in light of society's current inability to fully understand and dissect human behaviour."<sup>58</sup> He suggests the critics of Alternative #2 might phrase their argument in the following manner:

Judges and juries are incapable of distinguishing between persons who lack substantial capacity to control their behaviour and persons who could have controlled their behaviour but did not. Since this distinction is impossible, the choice between verdicts of guilty or not guilty by reason of insanity will be arbitrary. As well, if insanity verdicts are frequent, that will threaten the continued preservation of peace and order in our society by undermining the public expectation that people must in general accept personal responsibility for their conduct.<sup>59</sup>

---

58. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 *Queens L.Q.* 135 @ 142-3.

59. *Ibid.*, p. 142.

## OTHER CANADIAN PROPOSALS

### Federal Government's Proposal (1986)<sup>60</sup>

#### Defence of Mental Disorder, section 16:

**No person shall be convicted or discharged under section 662.1 of an offence in respect of an act or omission on the part of that person that occurred while that person suffered from a mental disorder that rendered him incapable of appreciating the nature or quality of the act or omission or of knowing that the act or omission is wrong.**

#### Observation:

1. In its final report (1985), on the Mental Disorder Project the government recommended that for the time being the current insanity test be retained, with minor word changes, for the following reasons:
  - i) there was some suggestion that the precise wording of the insanity defence was largely irrelevant; that judges and juries largely ignored the precise wording of the test and applied a more general, intuitive standard;
  - ii) the government's consultations with various groups revealed a disparity of views on the appropriate test and the fact that there was "... no clear evidence that a change in the legal definition would have any significant beneficial effect."<sup>61</sup>

---

60. This proposal was tabled in Parliament on June 26, 1986 entitled "Proposed Amendments to the *Criminal Code* (Mental Disorder)"

61. Department of Justice, Final Report, Mental Disorder Project (Ottawa), 1985, p. 26.

## **Department of Justice Proposal**

### **Defence of Mental Disorder**

**16.(1) No person is criminally responsible for an act or omission committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.**

### **Presumption**

**(2) Every person shall be presumed not to have been suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection (1), until the contrary is proved on the balance of probabilities.**

### **Raising Defence of Mental Disorder**

**(3) Subject to subsection (5), an accused or the prosecutor may adduce evidence for the purpose of establishing that the accused was suffering from a mental disorder so as to be exempt from criminal responsibility.**

### **Burden of Proof**

**(4) The burden of proof with respect to the issue of whether an accused was suffering from a mental disorder so as to be exempt from criminal responsibility is on the party raising the issue.**

### **Limitation on Prosecutor Raising Defence**

**(5) Where an accused does not raise the issue of whether the accused was suffering from a mental disorder so as to be exempt from criminal responsibility, the court before whom the trial is held may permit the prosecutor to adduce evidence for the purpose of establishing that the accused was suffering from such mental disorder where the court is satisfied that**

**(a) apart from the issue of whether the accused was suffering from such a mental disorder, the evidence previously adduced at the trial would warrant the jury, or the court where there is no jury, being satisfied beyond reasonable doubt that the accused committed the act or omission charged against the accused with the requisite criminal intent;**

**(b) the admission of the evidence of mental disorder to be adduced by the prosecutor would not prejudice the accused in respect of a defence that is reasonably available; and**

**(c) the interests of justice require the evidence of mental disorder to be adduced by the prosecutor, given**

**(i) the nature and seriousness of the alleged offence,**

**(ii) the extent to which the accused may be a danger to the public,  
and**

(iii) the substantial nature of the evidence to be adduced by the prosecutor indicating that the accused was suffering from a mental disorder so as to be exempt from criminal responsibility.

#### **Motion of Court**

(6) Where the court has reasonable grounds to believe that an accused was suffering from a mental disorder so as to be exempt from criminal responsibility, the court may, on its own motion, raise that issue.

#### **Definition of "Accused"**

(7) In this section, "accused" includes a defendant in summary conviction proceedings.

#### **Observations:**

1. This proposal is similar to the majority recommendation of the Law Reform Commission, s. 3(6).
2. Unlike the Commission's proposal, the Department of Justice proposal sets out the presumption of sanity and the rules of procedure relating to who can raise the issue and who has the burden of proof. Section 5 was proposed when the law approved of the Crown raising the insanity issue at trial in some circumstances: *R. v. Simpson* (1977) 35 CCC (2d) 337, *R. v. Saxell* (1980) 59 CCC (2d) 176. In light of the decision of the Supreme Court of Canada in *Swain v. The Queen*, unreported, (May 2, 1991) it is doubtful that the Department of Justice would be proposing s. 5 today.
3. This proposal makes it clear that these rules also apply to summary conviction procedure.
4. The Working Group on the General Part prefers the Department of Justice's version to the Law Reform Commission's majority recommendation.

## VI. ANGLO-AMERICAN JURISDICTIONS

---

### UNITED STATES

The criminal law of the United States has passed through several different insanity tests: the McNaghten Rule, the "irresistible impulse" or "control" test, the Durham Rule, the U.S. Model Penal Code (1962) and the *Insanity Defence Reform Act* (1984). Like Australia, it is the state which determines the appropriate insanity test for its jurisdiction. Except for the Durham test which is no longer being used anywhere in the United States, the above tests and various combinations are being applied in state courts. In the federal courts, it is the test set forth in the *Insanity Defence Reform Act*.

The defence of insanity has been abolished in three states - Idaho, Montana, Utah. Where mental disorder is raised at trials in these states, the focus is on the accused's capacity to form the requisite intent. In other states (Michigan, Indiana, Illinois, Georgia) the verdict of "not guilty by reason of insanity" has been replaced by a verdict of "guilty but mentally ill." The accused is then sentenced to a specific term of imprisonment which may be served in a mental hospital. After recovery the accused is returned to prison to complete his sentence.<sup>62</sup>

#### "Irresistible Impulse" Test

The "irresistible impulse" test was developed to cover the perceived deficiency in the McNaghten Rules of focusing solely on cognitive impairment. In Michael Phelps' paper, "The Search for the Optimum Definition of Criminal Insanity - the American Experience," he states that "... the irresistible impulse" or "control" test exempts an accused from legal responsibility by reason of insanity where the individual's mental state prevented him from controlling his conduct."<sup>63</sup>

Many jurisdictions have added the so-called irresistible impulse test to the right and wrong test ... it rests on the proposition of volition. It is perhaps a misnomer because it includes acts resulting from premeditation as well as from sudden impulse, but it is applicable when one understands the nature and consequences of his act and appreciates the wrongness of the act, but, in consequence of a mental abnormality, is forced to its execution by an impulse which he is powerless to control.<sup>64</sup>

Criticism similar to that heard in Canada against relaxing the insanity test to cover "irresistible impulse" was directed at this test - it was unworkable because of the difficulty in distinguishing an "irresistible impulse" from an impulse simply not resisted and even if it were applied, it might allow psychopaths and neurotics to escape criminal responsibility.

---

62. *The National Law Journal*, Vol. 4, No. 34 (May 3, 1982).

63. Phelps, "The Search for the Optimum Definition of Criminal Insanity - the American Experience" (1977) 37 CRNS 88 @ 89.

64. *Carter v. U.S.* (1963), 325 F. (2d) 697 @ 705.

## Durham Rule

The United States Court of Appeals for the District of Columbia in *Durham v. U.S.* (1954), 214 F. (2d) 862 took note of the problems in the McNaghten Rule and the "control" test and formulated a new test:

We find that as an exclusive criterion the right-wrong test is inadequate in that (a) it does not take sufficient account of psychic realities and scientific knowledge, and (b) it is based upon one symptom and so cannot validly be applied in all circumstances. We find that the "irresistible impulse" test is also inadequate in that it gives no recognition to mental illness characterized by brooding and reflection and so relegates acts caused by such illness to the application of the inadequate right-wrong test. We conclude that a broader test should be adopted.

**It is simply that an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect.**

We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating. We use "defect" in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

The Durham Rule was criticized as being too vague. Phelps points out that the critics "... feel that juries must be given some specific criteria for evaluating responsibility, and that if they are not so provided and are left to contend with vague and meaningless phrases, the issue will be left entirely in the hands of the expert witnesses."<sup>65</sup>

The major criticism of the Durham Rule was focused on the "product" test which required a causal link between the disease and the act:

Perhaps a more damning criticism is that the product test subverts the rule's major premise that the mind functions as an integrated whole. If one is to take the "product test" seriously, one must assume that the mind is compartmentalized, for it implies that mental disease causes some acts and not others. Apart from the difficulties of deciding whether the act was in fact produced by the mental condition, there is the further problem of an inordinately difficult burden on the prosecution. Once some evidence of disorder is adduced under this test, the state must prove beyond a reasonable doubt that the act was not the product of the mental disease or defect. If one considers that few psychiatrists are so bold as to assert that the act in question was definitely caused by a specific mental disorder, one can sympathize with the difficult task of showing that no connection results.<sup>66</sup>

Although the causal connection was relaxed somewhat by *Carter v. U.S.* (1957) 252 F. (2d) 608 @ 616-17, the Durham Rule became identified with that dilemma.

---

65. Phelps, "The Search for the Optimum Definition of Criminal Insanity - the American Experience" (1977) 37 CRNS 88 @ 94.

66. *Ibid*, p. 95.

### **U.S. Model Penal Code (1962)**

In 1955 the American Law Institute submitted its insanity test which was later formulated in the U.S. Model Penal Code (1962) under Article 4.01 as follows:

1. **A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.**
2. **As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.**

This Article drew from all three current tests - Durham, McNaghten and the control test. It eliminated many of the defects inherent in each of the above. By using the phrase "appreciate the criminality" instead of "know the nature and consequences" (as found in McNaghten) it eliminated the controversy over the interpretation of the latter phrase. Some feel that the word "know" means merely an awareness that the act is being committed. Others favour a broader view, one requiring an understanding of the nature and particularly the consequences of the act. The A.L.I. solution clearly favours the latter view and eliminates doubt as to its intent. By using the word "conform" it avoided the connotations of suddenness that so many see as part of the irresistible impulse test. In addition, it provides some of the specificity that juries found lacking in the Durham Rule. At the same time, it recognizes that a precise definition of insanity is impossible and that there must be room for the representatives of the community to make a moral decision. The decision to use the phrase "lacked substantial capacity" is also an improvement.

The A.L.I. recognized that few psychiatrists had ever testified about total impairment. Furthermore, most psychotics can and do respond to some authority, that is, they possess some capacity to conform. As a result, we find this passage at p. 158 of the Tentative Draft:

Nothing makes the inquiry into responsibility more unreal for the psychiatrist than the limitation of the issue to some ultimate extreme of total incapacity, when clinical experience reveals only a graded scale with marks along the way ...

We think this difficulty can and must be met. The law must recognize that when there is no black and white it must content itself with different shades of gray. The draft, accordingly, does not demand complete impairment of capacity.<sup>67</sup>

---

67. Phelps, "The Search for the Optimum Definition of Criminal Insanity - the American Experience" (1977) 37 CRNS 88, pp. 97-8.



***Insanity Defence Reform Act (1984) 18 U.S.C. 20***

**It is an affirmative defence to a prosecution under any federal statute that, at the time of the commission of the acts constituting the offence, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defence.**

This test is similar in substance to the Canadian Law Reform Commission recommendation in s. 3(6) of its Working Paper #31.

## **UNITED KINGDOM**

### **Criminal Code**

#### **Incapacity and mental disorder**

**33.(1) A person is not guilty of an offence if -**

- (a) he acts in a state of automatism, that is, his act -**
  - (i) is a reflex, spasm or convulsion; or**
  - (ii) occurs where he is in a condition (whether of sleep, unconsciousness, impaired consciousness or otherwise) depriving him of effective control of the act; and**
- (b) the act or condition is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.**

**(2) A person is not guilty of an offence by virtue of an omission to act if -**

- (a) he is physically incapable of acting in the way required; and**
- (b) his being so incapable is the result neither of anything done or omitted with the fault required for the offence nor of voluntary intoxication.**

**34. In this Act -**

**"mental disorder" means -**

- (a) severe mental illness; or**
- (b) a state of arrested or incomplete development of mind; or**
- (c) a state of automatism (not resulting only from intoxication) which is a feature of a disorder, whether organic or functional and whether continuing or recurring, that may cause a similar state on another occasion;**

**"return a mental disorder verdict" means -**

- (a) in relation to trial on indictment, return a verdict that the defendant is not guilty on evidence of mental disorder; and**
- (b) in relation to summary trial, dismiss the information on evidence of mental disorder;**

**"severe mental illness" means a mental illness which has one or more of the following characteristics -**

- (a) lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity;**

- (b) lasting alteration of mood of such degree as to give rise to delusional appraisal of the defendant's situation, his past or his future, or that of others, or lack of any appraisal;
- (c) delusional beliefs, persecutory, jealous or grandiose;
- (d) abnormal perceptions associated with delusional misinterpretation of events;
- (e) thinking so disordered as to prevent reasonable appraisal of the defendant's situation or reasonable communication with others;

**"severe mental handicap" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning.**

- 35.(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.
  - (3) A court or jury shall not, for the purposes of a verdict under subsection (1), find that the defendant was suffering from severe mental illness or severe mental handicap unless two medical practitioners approved for the purposes of section 12 of the Mental Health Act 1983 as having special experience in the diagnosis or treatment of mental disorder have given evidence that he was so suffering.
  - (4) Subsection (1), so far as it relates to severe mental handicap, does not apply to an offence under section 106(1), 107 or 108 (sexual relations with the mentally handicapped).
36. 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.
37. A defendant may plead "not guilty by reason of mental disorder"; and
- (a) if the court directs that the plea be entered the direction shall have the same effect as a mental disorder verdict; and

- (b) if the court does not so direct the defendant shall be treated as having pleaded not guilty.
- 38.(1) Whether evidence is evidence of mental disorder or automatism is a question of law.
- (2) The prosecution shall not adduce evidence of mental disorder, or contend that a mental disorder verdict should be returned, unless the defendant has given or adduced evidence that he acted without the fault required for the offence, or believing that an exempting circumstance existed, or in a state of automatism, or (on a charge of murder) when suffering from mental abnormality as defined in section 57(2).
  - (3) The court may give directions as to the stage of the proceedings at which the prosecution may adduce evidence of mental disorder.
- 39. Schedule 2 has effect with respect to the orders that may be made upon the return of a mental disorder verdict, to the conditions governing the making of those orders, to the effects of those orders and to related matters.
- 40. A defendant shall not, when a mental disorder verdict is returned in respect of an offence and while that verdict subsists, be found guilty of any other offence of which, but for this section, he might on the same occasion be found guilty -
  - (a) on the indictment, count or information to which the verdict relates; or
  - (b) on any other indictment, count or information founded on the same facts.

#### Observations:

1. With some important modifications, the Law Commission's Draft Code follows the recommendations of the Butler Committee on Mentally Abnormal Offenders.<sup>68</sup>
2. The terms "insanity" and "disease of the mind" are rejected in favour of "mental disorder."
3. The Law Commission rejected the Butler Committee's wide definition of mental disorder which was based on the Mental Health Act definition of "mental disorder" - "mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind" - subject only to the exclusion of "transient states not related to other forms of mental disorder and arising solely as a consequence of (a) the administration, mal-administration or non-administration of alcohol, drugs or other substances or (b) physical injury."<sup>69</sup> The Law Commission favoured a more restricted and well-defined

---

68. See Ashworth, "The Butler Committee in Criminal Responsibility" [1975] Crim. L.R. 687.

69. Commentary on Draft Criminal Code Bill, Vol. 2, para. 11.26.

formulation for "mental disorder" - (i) severe mental illness, (ii) arrested or incomplete development of mind, and (iii) pathological automatism that is liable to recur.

4. The Law Commissions wants "severe mental illness" to be restricted to serious cases of psychosis. In providing a detailed definition for that term, the Law Commission expects psychiatric evidence to be given in terms of strict "factual tests" rather than in terms of the abstract "disease of the mind."
5. The Law Commission expressed some reluctance in including "severe mental handicap" under "mental disorder." It is concerned that some persons against whom fault could not be proven might receive mental disorder verdicts and thus become subject to the protective powers of the criminal courts whereas under the current law they would receive unqualified acquittals. The Commission suggests that it might be more appropriate to leave any such acquitted person who might still be dangerous to be dealt with under the Mental Health Act.
6. The Law Commission recommends giving the prosecution the opportunity of persuading the jury (if it can) that the offence was not attributable to the mental disorder (s. 35(2)). It does so on the ground that it would be wrong in principle for a person to "... escape conviction, if although severely mentally ill, he has committed a rational crime which was uninfluenced by his illness and for which he ought to be liable to be punished."<sup>70</sup>

Critics of this provision, which is based on the Butler Committee's recommendations, say that it is wrong to search for a causal link. In reviewing the English Draft Code provisions for mental insanity Martin Wasik states:

It is important, however, to learn from the American experience in the decline of the Durham formula on insanity and not to search for a *causal* link. There is something conceptually wrong with the idea of a mental disorder causing an act. As Professor Fingarett says (the meaning of criminal insanity (1972) p. 247):

What we are concerned with in substance is not a causal relation between an internal disease entity and an external act ... the specific issue faced by the trier of fact is not a causal one but is one of practical judgment in assessing a person. The question is whether it is fitting to view the offending act as belonging to such a pattern of irrational conduct.<sup>71</sup>

7. The mental disorder is to be proved on a balance of probabilities (s. 36).
8. The courts are given flexible powers of non-punative disposal when a mental disorder verdict is returned, rather than being restricted to imposing a mandatory commitment to a mental hospital (s. 39). The range of disposal suggested by the Butler Committee but not yet formulated in the Draft Code includes the power to order in-patient treatment in hospital (with or without a restriction order), out-patient treatment, certain forfeitures, or a driving disqualification, and the power to discharge the acquitted defendant without any order.

---

70. *Ibid*, para. 11.15.

71. Wasik, "Codification: Mental Disorder and Intoxication under the Draft Criminal Code" (1986) 50 *The General Criminal Law*.

## **AUSTRALIA**

### **Crimes (Amendment) Act, (1990), Division 7 - Mental Illness**

#### **Ground of Mental Illness, 3Q.**

- (1) A person who is charged with an offence is entitled to be acquitted of the offence because of mental illness if, at the time of the relevant act, the person was, as a result of a mental disease or mental defect: (a) incapable of knowing what he or she was doing; or (b) incapable of understanding that what he or she was doing was wrong according to the ordinary standards of a reasonable person.**
- (2) A person who is charged with an offence may plead not guilty by reason of mental illness and, if the court accepts the plea, the acceptance has the same effect as a verdict of not guilty because of mental illness.**

#### **Evidence by Prosecution of Mental Illness, 3R.**

**The prosecution is not, on the trial of a person for an indictable offence, entitled to adduce evidence of mental illness of the person or to contend that the person should be acquitted because of mental illness unless: (a) the person has given or adduced evidence that suggests the possibility of the person having been mentally ill at the time of the relevant act; and (b) the court has granted leave to the prosecution to do so.**

#### **Onus and Standard of Proof of Mental Illness, 3S.**

- (1) The onus of proving that a person who is charged with an offence should be acquitted because of mental illness lies on the person who contends that the person should be so acquitted and, if both the prosecution and the person contend that the person should be so acquitted, no onus of proving that matter lies on either of them.**
- (2) A person who is charged with an offence is taken to have been mentally ill at the time of the relevant act if that fact is proved on the balance of probabilities.**

### **Observations:**

1. The Review Committee for the codification of the Commonwealth Criminal Law in Australia favours a simplified version of the McNaghten Rules. It wanted its definition of mental illness to meet two requirements:
  - i) it should be broad and non-technical and should embrace all forms of mental disease, disorder or deficiency which might render the accused not responsible for his or her actions,

- ii) it must incorporate some limitations so that a case of mental illness which would otherwise come within the definition would not exculpate the accused unless it had in fact affected the responsibility of the accused for his or her actions or omissions or was of a kind that was likely to have done so.<sup>72</sup>
- 2. The Review Committee believes "disease" or "defect" appears wide enough to satisfy the first requirement but is uncertain how the second requirement should be satisfied. It is critical of the U.K. Draft's definition of "severe mental illness" for two reasons - it may be too detailed for the purpose of instructing the jury and its characteristics may either prove to be incomplete or may become outdated.
- 3. The Review Committee was against any provision for insane delusions although it recognized that where an accused suffered from delusions that fact might be important evidence of the existence of a mental illness.<sup>73</sup>
- 4. The Review Committee was against a separate test for "irresistible impulse" but recognized that evidence that an accused could not control his or her actions should be regarded as relevant to the question whether the accused was suffering from mental illness.<sup>74</sup>
- 5. The Review Committee was against any provision regarding a defence of diminished responsibility to a charge of murder or any other offence.

---

72. Review of Commonwealth Criminal Law, Interim Report, July 1990 para. 9.39.

73. *Ibid*, para. 9.37.

74. *Ibid*, para. 9.38.

## **NEW ZEALAND**

### **Crimes Bill, Section 28, Insanity:**

1. A person shall be presumed to be sane at the time of doing or omitting any act until the contrary is proved.
2. A person is not criminally responsible for any act done or omitted to be done when suffering from a mental defect or mental disorder that renders the person incapable -
  - (a) Of knowing what he or she is doing or omitting to do; or
  - (b) Of attributing to the act or omission the character that the community would commonly attribute to the act or omission.

### **Observation:**

1. The Explanatory Note to the Draft Bill provides the following two comments:
  - i) Subclause 2(b) is rewritten to endorse the approach adopted in *R. v. MacMillan* [1966] N.Z.L.R. 616 (in that case the court restated the law in accordance with the test proposed in *McNaghten's Case* and the view taken in *Stapleton v. The Queen* rather than that in *R. v. Windle*). The question in that case was a difficult one. The accused knew that what he was doing was morally wrong in the eyes of the community generally, but, because of the peculiarities of his mental condition, he could not himself attach any wrongness to the act. It was held that this is sufficient to establish insanity.
  - ii) The clause does not attempt to deal with the question of volition. It seems that there are people who know what they are doing, know that it is wrong, but are unable, because of a psychiatric disorder, to stop doing it. How the law can provide for these states without opening the floodgates to those who simply give in to temptation is a question that has so far defied a practical answer.



## VII. UNFITNESS TO PLEAD

---

The *Criminal Code* deals with Unfitness to Plead on account of insanity in s. 615-617. As this aspect of insanity is more properly regarded as a part of criminal procedure, the only question to be addressed in this paper is whether a provision on unfitness to plead should be included in the General Part and if so, how should it be formulated.

**615.(1) A court, judge or provincial court judge may, at any time before a verdict, where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, direct that an issue be tried whether the accused is then, on account of insanity, unfit to stand his trial.**

There are two stages to the process. The judge must first decide if there is "sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence ..." at his indictable trial (s. 615(1)), his preliminary inquiry (s. 537(3)) or at his summary conviction trial (s. 803(7)): *R. v. McLeod, Pinnock and Farquharson* (1983), 6 CCC (3d) 29 (O.C.A.). If the judge is satisfied there is "sufficient reason to doubt" the judge then embarks upon the second stage which is a determination of whether or not the accused is unfit.

The insanity test for determining fitness to stand trial is different from the insanity test of s. 16. In *R. v. Woltucky* (1952), 103 CCC 43 (Sask. C.A.) 46-7, Chief Justice Martin summarized the difference in this way:

The fact that the counsel for the defence has not asked for the trial of an issue as to the sanity of the accused will not justify the holding of a trial, or the making of a conviction, if upon the evidence and before verdict a doubt arises as to the fitness of the accused to plead; the accused has if such doubt is revealed, a statutory right to have an issue directed: *R. v. Williams*, 50 CCC 230, [1929] 1 DLR 343, 63 O.L.R. 191, and if the Judge fails to make the direction the conviction will be set aside.

The insanity contemplated by section 967 (now section 615(1)) of the *Criminal Code* is different from that set forth in section 19 (now section 16), as sufficient to support the defence of insanity: the test on the issue is whether or not the accused is able to understand the proceedings; to try him if he is not able to understand the proceedings and to instruct his counsel would deprive him in all probability of his right to make his full defence. No one can be rightly tried while insane: *R. v. Lee Kun* (1915), 85 L.J.K.B. 515, 11 Cr. App. R. 293, per Lord Reading, C.J. @ p. 517 of the King's Bench Reports.

The *Criminal Code* does not set out the criteria for determining fitness. The case-law suggests the following considerations:

- i) whether the accused understands the nature and consequences of the proceedings,
- ii) whether he is able to rationally communicate with counsel, and
- iii) whether he can make decisions on the advice of counsel.<sup>75</sup>

---

75. *R. v. Gibbons* (1946), 86 CCC 20 (O.C.A.), reference re *R. v. Gorecki* (No. 1) (1976) 32 CCC (2d) 129 (O.C.A.), *R. v. Hughes* (1978) 43 CCC 97 (Alta. S.C.T.D.).

The mere fact that an accused may not be capable of acting in his best interests during his trial is not sufficient to warrant a finding that he is unfit to stand trial: *R. v. McIlvride* (1986) 29 CCC (3d) 348 (BCCA) 356.

While some courts have held that the burden is on whichever party raises the issue and that it is to be proven on a balance of probabilities (*R. v. Simpson* (1977) 35 CCC (2d) 337 (OCA) @ 363), other courts prefer to view the issue as an inquiry into the status of the accused, with no onus on either party and with the trier of fact being reasonably satisfied that the accused is fit to stand trial (*R. v. McIlvride, supra*).

## LAW REFORM COMMISSION PROPOSAL

### Section 3(5), Unfitness to Plead:

**Any person who, at any stage of the proceedings, is incapable of understanding the nature, object or consequences of the proceedings against him, or of communicating with counsel owing to disease or defect of the mind which renders him unfit to stand trial, shall not be tried until declared fit.**

### Observations:

1. The formulation sets out the criteria for determining fitness and extends the application of the rule to every stage of the proceedings, not just "at any time before a verdict" as stated in s. 615(1) of the *Criminal Code*.
2. This clause continues present law and leaves matters of procedure to the forthcoming Code of Criminal Procedure.
3. The Law Reform Commission points out in its comment to s. 3(5) that a fair trial (s. 11(d) of the *Charter*) requires, among other things, that the accused be able to understand the proceedings and answer the charge and that such understanding is impossible for someone mentally disordered.

## **DEPARTMENT OF JUSTICE PROPOSAL**

### **Unfit to Stand Trial**

"Unfit to stand trial" means, the inability of the accused on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered where the inability to instruct counsel to do so, and in particular, the inability of the accused on account of mental disorder to (a) understand the nature or object of the proceedings, (b) understand the possible consequences of the proceedings, or (c) communicate with counsel.

### **Observations:**

1. This formulation is narrower than the Law Reform Commission's Proposal in that it restricts the issue of unfitness to "any stage of the proceedings before a verdict is rendered." It is suggested that the reason for this limitation is that when the verdict has been delivered there is not as much need for the accused to be fit to plead since all the evidence is in and has already been assessed. There is some concern that if the time for raising the issue of fitness is extended beyond the verdict it could be used as a ruse to delay the proceedings in the event of an unsatisfactory verdict.
2. In one respect, this formulation is broader than the Law Reform Commission's Proposal in that the factors to consider in paragraphs (a), (b) and (c) are only examples of ways in which the accused may be unfit to plead on account of mental disorder, whereas in the Law Reform Commission's proposal they are the sole criteria.
3. The Working Group on the General Part prefers the Department of Justice's formulation regarding unfitness to plead.

## **ANGLO-AMERICAN JURISDICTIONS**

Neither the New Zealand Crimes Bill nor the English Law Commission's Draft Code has a provision concerning unfitness to plead.

### **U.S. Model Penal Code, section 4.04:**

**No person who, as a result of mental disease or defect, lacks the capacity to understand the proceedings against him or her or to assist in his or her own defence shall be tried, convicted or sentenced for the commission of an offence so long as such incapacity endures.**

### **Australian Draft Bill, section 20 ACA:**

- (1) A person is unfit to stand trial for an offence for the purposes of this Division if it appears, for any reason, that the person is so incapable of understanding the proceedings at the trial as to be unable to make a proper defence.**
- (2) No onus lies on any party to prove the existence of such an incapacity.**

## **VIII. ISSUES FOR CONSIDERATION**

---

1. Should the General Part include a provision for mental disorder?
2. If yes, how should it be formulated?
3. Should it include a special provision for diminished responsibility?
4. Should procedural guidelines (*e.g.* burden of proof, raising the issue - by whom and when) be included in the General Part?
5. Should the General Part include a provision for Unfitness to Plead?
6. If yes, how should it be formulated?