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**LA THÈSE A ÉTÉ
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THE EVOLUTION OF
THE INSANITY DEFENCE:
A CRITICAL ASSESSMENT

Sharon Moran

1985

Submitted to the Department of Criminology, University of
Ottawa, in partial fulfillment of the requirements for the
degree of Master of Arts.



Sharon Moran, Ottawa, Canada, 1985.

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CONTENTS

ACKNOWLEDGEMENTS.....	iii
-----------------------	-----

INTRODUCTION.....	1
-------------------	---

PART ONE THEORETICAL PERSPECTIVE

CHAPTER 1	CRIMINAL RESPONSIBILITY AND THE MENTALLY ILL.....	3
-----------	---	---

CHAPTER 2	INSANITY AS A DEFENCE.....	17
-----------	----------------------------	----

PART TWO HISTORICAL PERSPECTIVE

CHAPTER 3	A HISTORICAL OVERVIEW: THE PRE-McNAGHTEN YEARS.....	32
-----------	---	----

CHAPTER 4	THE McNAGHTEN RULES.....	46
-----------	--------------------------	----

CHAPTER 5	THE POST McNAGHTEN YEARS: OTHER TESTS OF CRIMINAL RESPONSIBILITY.....	62
-----------	---	----

PART THREE THE CANADIAN PERSPECTIVE

CHAPTER 6	LEGISLATION.....	89
-----------	------------------	----

CHAPTER 7	APPLICATION.....	104
-----------	------------------	-----

CHAPTER 8	STATISTICAL ANALYSIS.....	125
-----------	---------------------------	-----

PART FOUR CONCLUSIONS

CHAPTER 9	ALTERNATIVES AND FUTURE CONSIDERATIONS	153
-----------	--	-----

CHAPTER 10	CONCLUSIONS.....	169
------------	------------------	-----

LIST OF TABLES

1.	Persons Charged with Indictable Offences and Those Detained for Insanity in Canada 1961 to 1973.....	125
2.	Offences by Category and Those Detained for Insanity in Canada 1961 to 1973.....	127
3.	Charges Resulting in Detention for Insanity by Nature of Indictable Offence in Canada 1961 to 1973.....	130
4.	Canadian Cases Dealing with Insanity as a Defence 1885 to 1984.....	138

APPENDICES

APPENDIX I	Questions Posed to the House of Lords by the Judiciary Re: The Daniel McGaghten Case (1843).....	I 1
APPENDIX II	Tests of Criminal Responsibility.....	II 1
APPENDIX III	Tests of Criminal Responsibility in Other Countries.....	III 1
SELECTED BIBLIOGRAPHY.....		B 1
TABLE OF CASES.....		C 1

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Sharon Moran.

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1985

INTRODUCTION

To be insane is to be of unsound mind to such an extent that one is unable to distinguish between right and wrong. If a person is found by the court to have been insane when he committed an offence, then he is acquitted on account of insanity and kept in custody at the pleasure of the Lieutenant Governor of the province (Canada, 1981).

This thesis looks at insanity as a defence, its evolution and how it has been applied in Canada. Part One looks at the theory behind the insanity defence. When one pleads insanity he does so in an attempt to negate his criminal responsibility. A number of views relating to criminal responsibility and the mentally ill are discussed in Chapter One. Chapter Two analyses the insanity defence itself, its purpose and how it relates to the traditional theories of punishment.

Part Two presents a historical overview tracing the development of insanity as a defence from early times to today. Chapter Three looks at the punitive manner in which the mentally ill offender was treated and how the writings of Bracton, Coke, Hale and Hawkins affected the development of the early tests of insanity. Chapter Four discusses the

famous Daniel McNaghten case and the impact it has had on the law relating to insanity as a defence. Chapter Five outlines the tests that were formulated after the McNaghten Rules.

Part Three deals with the Canadian experience. Chapter Six traces the development of the law relating to insanity from the Codification of the Criminal Code in 1892 to today's legal test of insanity found in Section 16. Chapter Seven is an in depth analysis of Section 16 and how it has been interpreted by the Canadian Courts. Chapter Eight looks at a number of Canadian cases where the defendant has pleaded insanity and the outcome.

Part Four offers some solutions to the age old problem of insanity and the law by suggesting a number of alternatives and recommendations.

Chapter 1

Criminal Responsibility and the Mentally Ill

Our criminal law is based on a concept of blameworthiness which has its foundation in the Judao-Christian ethic and notion of free will (Parker, 1977: 5). The fundamental principle, recognized from earliest times, is that one must commit a criminal act with criminal intent in order to be convicted of a crime. There must be a concurrence of the act and the intent. This formulates the general test of criminal responsibility (Keedy, 1910: 400). Criminal responsibility means accountability for one's actions in relation to the criminal law. The tests of criminal responsibility are the rules of law which determine an accused's guilt (Keedy, 1911: 523). In all advanced legal systems liability to conviction for serious crimes is made dependent not only on the offender having done the legally forbidden acts, but having done them in a certain frame of mind. The Latin phrase mens rea (guilty mind) is used as a comprehensive name for these mental elements; and according to conventional ideas mens rea is a necessary element in liability to be established before a verdict (Hart, 1968: 187).

The doctrine of mens rea made its first recorded appearance in the laws of Henry I compiled about the year 1118. In the 12th century Henry Bracton committed himself to the first generalization on this subject when he said, "for a crime is not committed unless the will to harm be present" (Jacobs, 1971: 14). His comment reiterated the fundamental common law principle that a crime consists of two necessary ingredients - a criminal act (actus reus) and a criminal intention (mens rea) (Quen, 1981: 1). His term for the mental component was voluntus norcendi (Keedy, 1917: 539).

Bracton said, "We must consider with what mind or with what intent a thing is done... in order that it will 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 a crime is not committed unless the intent to injure intervenes..." 1

Contemporaries of Bracton had their own views on the subject of mens rea. Lord Hale spoke of the "will to

1 Jacques Quen, "Anglo-American Concepts of Criminal Responsibility: A Brief History" in Hucker, S., Webster, Ben-Aron, M. (eds) Mental Disorder and Criminal Responsibility, Toronto: Butterworths Co., 1981, p.2

commit an offence". Blackstone called it "vicious will". Austin used the term "criminal intent" (Keedy, 1917: 539). Although a variety of catch words were applied, for five centuries from Bracton to Blackstone, the general theory of mens rea remained virtually the same. It also fell prey to a considerable amount of criticism. Sir James Stephen, during the case of R v Tolson said, "mens rea was confusing and contradictory because it included so many dissimilar states of mind" (Keedy, 1917: 539). His criticism was aimed at the maxim "actus non facit reum nisi mens sit rea", which he claimed was used frequently and ignorantly to mean that there can not be such a thing as legal guilt where there is no moral guilt (Stephen, 1883: 95). Stephen found the meaning implied by this maxim to be untrue for two reasons. Firstly, there is always a possibility of conflict between law and morals. Secondly, the mental element varies with each crime. Therefore the only means of arriving at a full comprehension of the expression mens rea is by a detailed examination of the definitions of particular crimes and thus the expression itself is meaningless (Stephen, 1883: 95).

Though mens rea differs in different crimes there is one necessary element, the voluntary doing of a morally wrong act forbidden by the law. Hence the law inquires into the

mind of the accused in order to ensure that no one shall be punished in the absence of the basic condition of moral culpability. For it is only just to punish those who have intentionally committed a moral wrong proscribed by law (Hart, 1968: 36).

The principles of equality before the law were reflected a hundred years ago; the general principles of criminal responsibility were, for the most part applied without regard to age. These general principles were taken to include the requirement that a person could not be convicted of an offence unless at the time when the act was done he had a guilty mind (Jacobs, 1971: 63). It is generally accepted in our criminal justice system that a person should not be punished if he is not responsible. In the legal sphere, one is held "responsible" if the harm is causally connected to something one did or omitted to do (Weisstub, 1980: 58). Though in certain general contexts legal responsibility and legal liability have the same meaning, to say that someone is legally responsible for some act is to state his connection with the act is sufficient for liability according to law (Hart, 1968: 222).

Criminal responsibility results when each element of the crime has been established beyond a reasonable doubt. The state is authorized to exercise its power by imposing sanctions on the offending party (Katz and Goldstein, 1963: 854). Essential to the legal definition of responsibility is the idea that if you do something, knowing it is wrong, you will also know that one of the consequences will be some type of punishment (Whitlock, 1963: 59). Sir James Stephen (1883) also stressed the relationship between responsibility and punishment. According to him responsibility is nothing more than the actual liability to be punished for the act done. He took this view a step further when he said that if the criminal law does not determine who is to be punished under given circumstances it determines nothing (Stephen, 1883: 183). According to Francis Whitlock (1963), when we say we are responsible for a given act we usually imply, that we will accept the consequences if something goes wrong, but we also feel that the action and any possible results flowing from it are in a way our personal concern, indicating some sort of moral relationship which imposes a sense of obligation.

Professor Jerome Hall believes that moral culpability is the basis of criminal responsibility and that punishment should be confined to the intentional or reckless doing of a

morally wrong act (Hart, 1968: 138). Responsibility seems to have a wider extension in relation to the law than to morals. Whether this is due merely to the general differences between the law and morality, or to some differences in sense of responsibility involved, remains to be seen (Hart, 1968: 215).

According to Lady Barbara Wooton, to be responsible is to be responsive to the normal stimuli of reward and punishment. She equates responsibility with bad social or criminal behaviour, implying that social deviants are irresponsible whereas social conformists are responsible. Prevezer, on the other hand does not see responsibility as a quality inherent in the accused but more as an attribute that is ascribed to him (Whitlock, 1963: 59).

It is apparent that the views on criminal responsibility are varied and conflicting; as are the means of assessing one's responsibility. Guttmacher formulated his objective criteria for criminal responsibility in 1954 believing the decision should fall on the shoulders of the psychiatrist. They are expected to identify and label the offender's disorder and to determine if the malady could affect the social behaviour to such a degree that the

criminal act is a product of the mental disorder (Szasz, 1963: 997). Glueck's (1962) guidelines for a test of criminal responsibility also focused on the psychiatric profession but went a step further to include lay people who compose a jury in criminal cases. He felt the test must be fairly in harmony with contemporary psychiatry but as far as possible be in familiar terms as to be understood by the average lay juror.

The test for criminal responsibility formulated by J.W.C. Turner is embodied in three basic rules. It must be proved that:

- 1) the conduct of the accused person caused the actus reus
- 2) the conduct of the accused was voluntary
- 3) the accused person realized at the time, that his conduct would, or might produce results of a certain kind (Hart, 1968: 141).

Grant Morris' (1970) test for criminal responsibility is that a person is not criminally responsible for his conduct if, as a result of impairment of his mental or emotional processes or behaviour controls he lacked the substantial capacity to appreciate the wrongfulness of his conduct or conform to meet the requirements of the law.

The presence of "responsibility" in an accused person's conduct may be established by social ethical, philosophical and other criteria which doctrines of criminal law can convert into legal guilt. The conversion of responsibility into legal guilt is dependent upon criminal processes and it is in this context that responsibility has an original and pedantic meaning ²

Allegedly, criminal law is based on the notion of free will rather than determinism. The basic premise of this distinction has two consequences with respect to criminal responsibility. Firstly, the law considers it unjust to punish someone who was incapable of forming the mens rea when he committed a criminal act. Secondly, the law takes the attitude that punishment after conviction has no value and serves no purpose if the accused is unable to understand the reason for the punishment (Parker, 1977: 213). Despite much controversy concerning this issue, it is held that we do exercise freedom of choice but this freedom can be influenced by emotional conflict and tension (Whitlock, 1963: 70).

2. Bernard Dickens "The Sense of Justice and Criminal Responsibility" in S. Hucker, C. Webster and M. Ben-Aron (eds), Mental Disorder And Criminal Responsibility, Toronto: Butterworths Co., 1981, p.53

Therefore the general rule is that people are responsible for their behaviour and actions but there are several exceptions.

A person may lack mens rea and therefore criminal responsibility for a wide variety of reasons. Those factors which will remove criminal responsibility, if they are proven by the defense are: mistake, accident, duress, provocation and insanity (Gunn, 1977: 523). The remainder of this chapter will focus specifically on insanity and how it relates to criminal responsibility.

The ordinary test of criminal responsibility will cover the so called border-line cases, when some symptoms of mental disorder appear, but are sufficiently marked or numerous to justify the use of a term which distinguishes the patient from the generality of his fellow-man. 3

It has always been an unwritten principle that a person can not be legally punished for an act committed while he was insane. This view prevailed even at a time when ideas about causes and symptoms of mental illness were less than refined and generally based on erroneous assumptions. It was

3. Edwin Keedy, "Tests of Criminal Responsibility of the Insane" in Journal of the American Institute of Criminal Law and Criminology 1. (1910) p. 402

recognized in Ancient Hebrew law that "deaf mutes", imbeciles or minors were not responsible for their actions. Aristotle believed that the capacity to make choices was a critical element in determining criminal responsibility and that this capacity was lacking in animals, children and the insane. Even under the strict secular law of early Britain the insane were not held responsible and the burden of making reparations fell on the shoulders of their family (Quen, 1981: 1).

Under traditional criminal law the position that under certain circumstances of mental impairment the individual should not be treated as a criminal has prevailed (Packer, 1968: 15). Psychiatrists may be correct when they argue that the mentally ill are precluded from the exercise of free will and choice (Whitlock, 1963: 71). To be insane is to be of unsound mind to such an extent that one is unable to distinguish between right and wrong (Canada, 1981). Insanity may affect the knowledge by which ones' actions are guided; the feelings by which ones' actions are prompted and the will by which ones' actions are performed. Cases may also occur where the individual's insanity interferes with his power of self-control thus leaving the sufferer at the mercy of temptation (Stephen, 1883: 170). According to the

law, defendants must be classified appropriately, thus the responsible and the sane are on one side while the irresponsible and the insane are on the other (Weisstub, 1980: 617).

Even though it appears straightforward, it is quite difficult to formulate rational criteria for determining, on the grounds of supposed abnormality, who is responsible and who is not. It is further complicated by the fact that the person must not only be mentally ill, but that it was his particular affliction that caused him to commit the criminal act he is accused of. If this causal connection between the illness and the subsequent act is omitted, the whole test of criminal responsibility may be altered and become more restrictive (Jacobs, 1971: 32). Thus, mentally ill offenders who are truly not responsible for their actions would be denied the protection of the judicial system.

It appears that the issue of criminal responsibility is indeed a purely legal question, one to be answered by the law, the issue of insanity is, however a medical one which must in turn be answered by the medical profession (Keedy, 1911: 523).

A number of criticisms have been levelled against the concept of criminal responsibility itself and, in particular, how it is affected by the possible insanity of the accused. Thomas Szasz (1963) believes it is a mistake to think that criminal responsibility is a trait or quality which we can detect by observing the offender. Others feel that the concept of criminal responsibility itself has become irrelevant and that all offenders should be treated in whatever way is best for them. The case against responsibility is that the notions associated with it have lost their meaning. It is no longer necessary to ask whether a man is guilty or innocent, or to relate his punishment to his crime (Clyne, 1973: 92).

Lady Barbara Wooton has made several attacks on the idea of criminal responsibility and its' application in the courts. Part of her criticism is based on the fact that it is never possible to say what goes on in the mind of the defendant at the time of the commission of the alleged offense. It is also not possible to determine how substantial the impairment of responsibility was. Her suggestion is that it would be better to stop trying to define the undefinable. The courts should instead turn their attention to proving the charge and then in light of all the

facts, dispose of the offender in the manner most suited to his and society's needs (Whitlock, 1963: 8).

Lady Wooton feels that the proposal to bypass or disregard the concept of responsibility is too easily misunderstood. To discard the notion of responsibility does not mean the mental condition of an offender is no longer important. The present law of classifying offenders as mentally disordered or criminally responsible produces anomalies and creates a situation where it is difficult to think of any form of objectionable behaviour which the formula could not be stretched to cover (Wooton, 1981: 91).

Two quite different proposals are involved in the elimination of responsibility. In the first case it is either a refusal to recognize the category of mental abnormality or to discriminate, for the purpose of conviction, between the mentally normal and the mentally abnormal. In the second case it is a rejection of mens rea

4

According to Professor H.A. Hart (1968) if the principle of criminal responsibility was eliminated society would lose the ability to predict and plan the future course of our lives within the framework of the law. In a system where responsibility has been eliminated a person would be liable for acts done by mistake or accident.

There have been a variety of tests which have been formulated over the years attempting to deal with the issue of criminal responsibility. They run the gamut from the much criticized McNaghten Rules to the more controversial Irresistible Impulse and Diminished Responsibility Doctrines. These tests and others will be discussed in more detail in a subsequent chapter.

There is no room for extremes of opinion in the controversy over criminal responsibility. Somehow it is essential to face the medical facts as well as the legal facts, fit them together in a proper manner so as to diagnose and when possible treat the offender for the benefit of the individual and society. 5

Chapter 2

Insanity as a Defence

The mental condition of a person accused of a crime may be raised in two different determinations: 1. his competency to stand trial and, 2. his responsibility at the time the act was committed (Morris, 1978: 6). If the accused should wish to use his mental illness as a defence to a charge he will ordinarily be able to do so only through the insanity defence (Goldstein, 1967: 191). According to Canadian law, to establish a defence of insanity it must be proved on the balance of probabilities that: 1. the accused was suffering from a disease of the mind and, 2. the disease rendered the accused incapable of appreciating the nature and quality of the act or of knowing the act was wrong (Silverman, 1981: 579).

According to Alexander Brooks the insanity defence embraces three basic types of excuses:

1. I didn't know what I was doing or I didn't know that what I did was wrong.
- 2 I couldn't help it.
3. I was mentally ill when I did it." 1

1. J.Arboleda-Florez, "Insanity Defence in Canada," Canadian Psychiatric Association Journal 23 (1978) p. 24.

The word insanity has many meanings in the law depending upon the context in which it is used. As far as criminal law is concerned it must be defined for the purposes of identifying the scope of a special kind of defence to a criminal charge and also for various procedural purposes (Shadoan, 1972: 268). When a defendant's mental derangement is set up as a defence to a criminal charge the question is not whether the defendant is insane, but whether the particular mental disease he is suffering from resulted in him lacking the intent necessary to commit the crime he is accused of (Keedy, 1911: 524).

Underlying the whole issue of insanity as a defence to a criminal charge is the basic conflict between the legal and psychiatric understanding of the issue (Kaufman, 1982: 17). The concepts of guilt held by the two disciplines seem to have little in common (Johnson, 1982: 46). Up to a certain point legal insanity is quite an easy concept to define. It can be seen as whatever circumstances and conditions are prescribed by a particular system of criminal law which excuses a person from criminal responsibility (Clyne, 1973: 10). "The defence of insanity contributes to the preservation of a sense of justice by making the legal

definition of crime meaningful." 2 The law itself is concerned with establishing fault; it does this by focusing on individual responsibility as a way of controlling society's behaviour (Kaufman, 1982: 17). The question of insanity, however, is really not a question of law but one of fact (Crotty, 1923: 105).

Mental insanity, on the other hand means "mental illness" as it is understood by the medical profession (Clyne, 1973: 10). The task of determining an accused's mental condition is delegated to the field of psychiatry. Psychiatrists become involved in the legal process and are often asked to determine an accused's fitness to stand trial or his degree of responsibility. They are interested in identifying, diagnosing and treating mental disorders and in understanding the attitudes, actions and the environmental causes behind any disorders (Kaufman, 1982: 17). Although psychiatrists are called upon to make determinations about the defendants they stress the fact that insanity is a legal term and the decisions being made are basically legal calls

2. Abraham Goldstein, The Insanity Defence, New Haven, Yale University Press, 1967, p. 211.

which they are ill-equipped to make (Johnson, 1982: 46). If the accused should say he did not have the requisite mens rea and seek to establish this from disease of the mind, he probably has raised the insanity defence. Whether the mental condition described by the experts called to testify amounts to a disease of the mind is a question for the court not a question for medical experts (R v Clarke, 1972: 184).

"The insanity defence is caught in a cross-current of conflicting philosophies. Its roots are deep in a time when people spoke confidently of individual responsibility and of 'blame', of the choice to wrong. The emphasis was on the individual offender and the defence was seen as an instrument for separating the sick from the bad".³

It seems that the purposes of the insanity defence has been assumed to be so obvious it does not require articulation or it is expressed in such vague generalizations as to afford no basis for evaluating the multitude of formulae (Goldstein and Katz, 1963: 859).

3. E. Tanay, "In Defence of the Insanity Defence" in S.J. Hacker, C. Webster and M. Ben-Aron (eds), Mental Disorder and Criminal Responsibility, Toronto, Butterworth, 1981, p. 121.

One assumption underlying the insanity defence is that it allows society to distinguish between those who need correctional incarceration and those who require a medical custodial disposition. A line is drawn between the bad (the criminal offender) and the mad (the insane defendant). The former receives punitive sanctions and, the latter is restrained for treatment of his mental condition to ensure the anti-social conduct is not repeated (Morris, 1970: 3). The insanity defence therefore appears to make it possible to weed out those who need special treatment; it is a useful defence for an accused who is not a habitual criminal (La Fave and Scott, 1972: 270). Some of the rules of evidence are suspended thus limiting what is heard by the jury. The insanity defence is not the easy way out that many feel it is. It would be a devastating course of action for a habitual criminal to take, he would be defeating his own purposes and only an incompetent lawyer would use this defence (Tanay, 1981: 131).

As a rule jurors do not respond favourably to an insanity defence and this is often a big determinant when deciding to raise one. Most jurors, like society in general subscribe to the view that an individual should be held accountable for what he does (Shadoan, 1972: 536). If

are often reluctant or unwilling to acquit by reason of insanity (Chernoff and Schaffer, 1971: 510). If the charge is relatively minor, or a non-aggressive one, jurors may have difficulty attributing the behaviour of the accused to a mental illness. On the other hand, where the crime is a very serious one they may be hesitant to pass down a finding of insanity fearing it will result in the release of a potentially dangerous person back into the community (Shadoan, 1972: 536). Research has shown that many lay persons see the insanity defence as a legal loophole which allows the guilty to go free (Chernoff and Schaffer, 1971: 510). Like other diversion techniques, the insanity defence frustrates the need for revenge and evokes negative feelings within the victims, those close to them and society in general (Tanay, 1981: 122).

The theory behind the insanity defence is a good one. After all, treatment appears to be an attractive alternative to punishment for a defendant whose unlawful conduct was the product of a mental illness (Chernoff and Schaffer, 1971: 523). However, acquittal on the grounds of insanity is really a misnomer, the verdict represents a form of conviction and sentence. The plea involves not only an

admission of an evil act but also the acceptance of post trial sanctions (Tanay, 1981: 123). The defence does result in an acquittal but the acquittal results in the individual being deprived of his liberty, he is held in a psychiatric facility for an indeterminate period of time (Goldstein and Katz, 1963: 858).

The general principles of criminal law allow a defence of insanity to sanction the mentally ill, excluding them from liability (Greenwald, 1968: 583). This view adheres to a time honoured idea in Anglo-American jurisprudence that we should only punish conduct when it is blameworthy (Kaufman, 1982: 17). It is usually used by non-repeating offenders and can be instrumental in preventing the death penalty or life imprisonment in cases where such a sentence would constitute a grave miscarriage of justice (Tanay, 1981: 121).

It was not until the late eighteenth and early nineteenth centuries that the medical profession paid any serious attention to the issue of insanity. Before that time the medieval notions of the insane prevailed and they were seen as being possessed by demons (Crotty, 1923: 105).

During the nineteenth century the issue of responsibility

During the nineteenth century the issue of responsibility became apparent and by the beginning of the twentieth century other attitudes started to emerge. Determinist influences - Darwinism, social positivism and Marxism began to shape the criticism of the insanity defence. Attention turned away from the archaic concept of blame and focused on the causes of crime. The insanity defence benefitted from these new approaches; firstly the reformers wanted to broaden the defence so more offenders could take advantage of it and then they wanted to change the whole criminal law to become a process for dealing with social danger, regardless of blame (Goldstein, 1967: 212).

In essence the basic purpose of an insanity defence is to weed out of the criminal justice system those who should be subjected to a medical-custodial disposition. This purpose is consistent with generally accepted theories of punishment (La Fave and Scott, 1972: 268).

Perhaps the best known and most widely postulated theory of punishment is that of specific deterrence, also known as the prevention theory. It is believed that if an individual is subjected to an unpleasant experience such as imprisonment he will be deterred from repeating his

behaviour in the future and thus will avoid further sanctions. The underlying assumption of this theory is that the individual is able to comprehend the sanctions imposed on those who violate the law and to respond accordingly (Morris, 1970: 2). It is difficult to determine whether a severely disordered person will be deterred by the threat of punishment. The insanity defence exists to divert those persons to a mode of treatment directed at the causes of their behaviour and intended to overcome the mental disability which might result in future anti-social or harmful conduct (La Fave and Scott, 1972: 291). The existence of the insanity defence, coupled with hospitalization of the individual also affords society's members with protection against a repetition of the criminal act (Morris, 1970: 2).

In addition to deterring the individual from committing further offences punishment also shows the rest of society what is in store for law breakers and thus serves as a general deterrent. This purpose of punishment would not be served by convicting and punishing the insane. Deterrence is more powerful when individuals can identify with the offender and the offending situation (LaFave and Scott, 1972: 271). It is unlikely that non-criminal :

non-insane individuals will identify with the insane individual and therefore he does not serve as an appropriate deterrent example for the rest of society (Morris, 1970: 2).

Another purpose of punishment is the protection of society from dangerous persons. The restraint theory is based on this notion. Those who are convicted for a serious crime are generally incarcerated for a specified period of time thus insuring the protection of the members of society for the duration of the sentence (Morris, 1970: 2). Perhaps the insanity defence serves the purposes of the restraint theory better than the traditional means of dealing with offenders. This is due to the fact that those remanded for treatment are required to remain in custody until they are no longer considered dangerous. Those who are found guilty and imprisoned remain incarcerated for a specific time period and are not required to be deemed non-dangerous upon their release (La Fave and Scott, 1972: 271).

The criminal justice system provides incarcerated offenders with a variety of rehabilitation programs in order that they can emerge from prison as better individuals.

Through these programs offenders can be helped to overcome drug and alcohol problems, take academic courses or learn a skill or trade. These types of programs are consistent with the rehabilitation theory of punishment. Under this theory sanctions are imposed to alter a persons's behaviour to a pattern that is more socially accepted and make him a useful member of society. Through the insanity defence post acquittal hospitalization permits the mentally ill person to be rehabilitated through appropriate treatment techniques (Morris, 1970: 2). It is generally assumed that the means used to rehabilitate the insane offender should be different than those useful for the rehabilitation of others. Through the insanity defence, the mentally ill individual is diverted to a psychiatric facility so that he may receive treatment that will hopefully be instrumental to his rehabilitation (La Fave and Scott, 1972: 271).

Punishment also serves an educational purpose. The process of trials, prosecution, conviction and the imposition of sanctions helps educate the public with respect to the workings of the criminal law and the sanctions that can be imposed. However punishing those who are insane and really not blameworthy would only blur the

distinction between good and bad conduct and thus works against the education theory (La Fave and Scott, 1972: 272).

The retribution theory is the oldest theory of punishment. It is concerned with the question of paying back the individual for the harm he has done, for the consequences of his conduct or whether he seeks to redress his moral guilt (Jacobs, 1971: 12). Mentally disordered individuals are not considered blameworthy because they lack the capability to form the necessary criminal intent required to commit a crime (Morris, 1970: 2). Although it is felt the criminal owes the community a measure of suffering because of that which he has inflicted (La Fave and Scott, 1972: 272); the application of the insanity defence acts as a device to preclude retributive punishment of individuals whom are viewed as non-blameworthy (Morris, 1970: 2).

In addition to being consistent with the accepted theories of punishment, a theory of the proper normative content of the insanity defence should also be related to the general theories of criminal responsibility (Colvin, 1981: 13).

The fairness theory of criminal responsibility states that only persons who could and should have chosen to avoid an act may be punished for that act. An insanity defence may be permitted under this theory but an argument can also be made against its existence. If one possesses the capacity to comprehend the rule of law it is not immediately apparent that the benefits of imposing liability should be forgone due to his inability to comprehend a different set of rules (Colvin, 1981: 15).

Jeremy Bentham has been associated with the utilitarian view and its offshoot, the social control theory of criminal responsibility. The law is viewed as a system which is designed to achieve certain goals by threatening sanctions in order to encourage adherence to standards of behaviour (Colvin, 1981: 13). Bentham believed that in order for the threat of punishment to be effective it is necessary that the individual not be subject to gross coercion or duress, not be mad or a small child (Hart, 1968: 77). If the causal connection between the threat of sanctions and the attainment of a desired goal breaks down then enforcing the rules becomes pointless (Colvin, 1981: 13). According to Bentham the threat of punishment to those who have committed a crime owing to

their mental condition, whether it be temporary or relatively enduring would be socially useless (Hart, 1968: 77). Not only are Bentham's views consistent with the general and specific deterrence theories of punishment but also explains the exemption of the insane from legal responsibility and thus justifies the existence of the insanity defence.

The theory of moral culpability equates criminal responsibility with moral culpability. If a person can not understand the moral wrongness of his act he cannot be blamed for the act. He should also not be subjected to the stigmatizing and penal features of the law. Despite the fact that this theory is problematic, even if it were acceptable, it would not necessarily lead to the conclusion that the insanity defence should incorporate an extra-legal standard of wrongfulness (Colvin, 1981: 15).

It seems the insanity defence does exclude from criminal responsibility individuals whose mental condition is such that a finding of guilt would not serve the purpose of the criminal law (Morris, 1970). The existence of an insanity defence is tolerated because to exclude it is to

deprive the criminal law of its chief paradigm of free will (Packer, 1968: 132). However, according to Goldstein, we are at a point in history where it is not clear what the purpose of criminal law is and what the function of the insanity defence is or should be (Morris, 1970).

We excuse a man who does not understand not because he does not understand but because his lack of understanding renders him incapable of making a meaningful choice. Cognition is not the complement of volition; it is its precursor. 4

Chapter 3

A Historical Overview: The Pre-McNaghten Years

The common law from early times recognized that some forms of insanity allow the offender to be exempted from criminal liability (Martin, 1969: 240). The subject of mental aberration fell into two major categories. The first; mental insufficiency, comprised those who the law knew as lunatics, individuals who lacked something in their mental make-up. The second category; mental perversity, included those people who possessed a disorder of the mind; the term idiot was applied to those falling into this group. In early times the distinction between idiots and lunatics was an important one. As a result of the Statute de l'arogativa Regis, The King was given the land of those termed idiots, he could take all the profits but was still required to provide necessities for the idiot. In the case of the lunatic the King took the profits but did not reserve any part of them for the royal revenues (Crotty, 1924: 109).

One of the earliest authorities on the insane offender, Theodoric, Archbishop of Canterbury (668-690 A.D.) declared

that it was lawful to say masses for the insane man who killed himself while insane but in other cases of suicide it would be unlawful to do so (Crotty, 1924: 111).

It was during the reign of King Henry III that the use of insanity as an excuse to criminal conduct first appeared (1216-1272). Persons who committed homicide were granted a King's pardon if they were believed to be of unsound mind (Simon, 1967: 16). These pardons were not unusual and became so frequent that they were ultimately granted as a matter of course if the situation so dictated (Gray, 1971: 559). By the reign of Edward (1272-1307) complete madness was an acceptable defence to a criminal charge. A King's pardon was no longer necessary to save the life of the insane criminal (Simon, 1967: 16).

It was Bracton, a thirteenth century English priest and legal analyst (Beran and Toomey, 1979: 9) who wrote the first systematic treatise in English law. He attempted to identify the degree of mental disorder that exculpates an offender (Arboleda-Flórez, 1978: 24). Bracton is usually credited with formulating the wilde beaste test but in fact the test is a corruption of his more sensitive theories. The wilde beaste concept appears to have developed from the

medieval superstition of demonic possession. It was quite simplistic, attempting to distinguish the man from a beast on the basis of reason and readily lent itself to extractions for more elaborate treatment of insanity (Gray, 1971: 563). Bracton grouped together cases of accident, infancy and insanity, but it is not clear that they were similarly treated (Jacobs, 1971: 25). To him the insane person was one who did not know what he was doing and was lacking in mind and reason (Arboleda-Florez, 1978: 24).

In 1581 William Lambard, a noted legal authority and member of one of England's several Inns of Court published Eirenarcha. It was a handbook for justices of the peace and served as a standard reference (Simon, 1967: 17).

He articulated the test of insanity in a primitive fashion by asking whether "a man or a natural fool or a lunatic in the time of his lunacy or a child who apparently has no knowledge of good or evil," committed the offending act. He argued that an act committed by such a person could not be considered felonious because the offender "cannot be said to have any understanding will". 1

1. Irving Kaufman, "The Insanity Plea on Trial" in The New York Times Magazine, August 8, (1982) p. 17

By the sixteenth century the emphasis had shifted from the quasi-religious idea of good and evil to the modern concept of the knowledge of right and wrong (Kaufman, 1982: 12). It was during this period that insanity was adopted by the courts as a valid defence (Gray, 1971: 559). According to Sir James Stephen, up until this time the instances found of insanity as a defence were little more than "antiquarian curiosities" (Crotty, 1924: 111).

In the early seventeenth century Sir Edward Coke's observations on the criminal acts of the insane once again drew attention to the subject. In a 1604 case Coke ruled that no felony or murder could be committed without a felonious intent or purpose. He also stressed that the mental derangement needed to be severe in order to exculpate the offender. If the offender was so deprived of reason that he resembled a beast rather than a man he could not have a felonious intent and thus could not be convicted of a crime (Whitlock, 1963: 12). Coke felt that the madman was sufficiently punished by his madness (Jacobs, 1971: 26). Included in Coke's classification of the insane were the idiot, the lunatic, the person who by sickness, grief or other accident has wholly lost his memory and understanding

and the person who sometimes has his understanding and sometimes does not (Goldstein, 1967: 10). He also had a classification known as non compis mentis, this included the drunkard - insane by his own hand (Kessler, 1982: 1).

The end of the seventeenth century brought the first systematic application of medical science to jurisprudence in a proposal made by Sir Matthew Hale (Gray, 1971: 566). It was published in History of the Pleas of the Crown, sixty years after his death (Jacobs, 1971: 26). Hale concluded that if the madness was such as to deprive the offender of his use of reason, he was excused from capital crimes (Crotty, 1924: 112). He did agree with his predecessor, Sir Edward Coke with regard to the fact that the disturbance had to be severe in order to excuse one from punishment (Whitlock, 1963: 15).

Hale is probably best known for drawing a distinction between partial and total insanity.

According to Hale, "It is very difficult to determine the invisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by judge and jury, lest on the one side there should be a kind of inhumanity towards the defects in human nature; and the other side, too great an indulgence given to great crimes." 2

For Hale, total insanity negated criminal intent (Rubin, 1965: 2). It involves an absolute madness, a condition which leaves one "totally deprived of memory and reason" (Simon, 1967: 17). A person would not be held responsible if at the time of the offence his mental capacity was less than that of a child of fourteen years old (Gray, 1971: 563). Hale claimed that such a condition excused a criminal act because the offender could not form the felonious intent (Simon, 1967: 17). For Hale partial insanity included that class of persons who give the appearance of being deluded only in respect of one area, but appear sane in all other matters (Whitlock, 1963: 15).

2. Frances Whitlock, Criminal Responsibility and Mental Illness. London, England, Butterworths, 1963, p. 14

Theoretically partial insanity could also excuse an offender, but it would be difficult because in practice the courts behaved as if the insanity defence was unavailable to any accused who retained even a vestige of sanity (Simon, 1967: 17). Hale's test did not receive much attention; one possible reason may be that at that time there was little understanding of the relationship between mental age and mental capacity. It was also difficult for society to accept the possibility of excusing criminals on the grounds of insanity perhaps since no viable alternatives to imprisonment existed at that point in time (Gray, 1971: 563). Hale recognized that the insane could not face trial, be sentenced or executed. This view was echoed in later years by Sir John Hawles and Blackstone (Whitlock, 1963: 15). Blackstone devoted a chapter of his commentaries to the treatment of the insane offender:

"In criminal cases, therefore, idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no not even for treason itself" "..... a total idiocy, or absolute insanity, excuses from the guilt, and of course from the punishment of any criminal action committed under such deprivation of the sense; " 3

3. Homer Crotty, "The History of Insanity as a Defence to Crime in English Criminal Law" in California Law Review 1923-24 #12 p. 114

In Hawkins' Pleas of the Crown, those who are under a natural disability of distinguishing between good and evil are not punishable, included in this category are infants under the age of discretion, idiots and lunatics (Crotty, 1924: 113).

Despite noble attempts made by Bracton, Coke, Hale, Hawkins and Blackstone to explain the relationship between the law and insanity medieval attitudes towards mental illness were still prevalent. A belief in the practice of witchcraft was widespread and this influenced legal conceptions of the source of mental disorders (Kaufman, 1982: 17). Those displaying symptoms of mental disease were seen as being possessed by the devil, perversely wicked and treated harshly especially when brought before the court. In the early eighteenth century the conception of insanity was still quite vague and largely incorrect: medical treatment consisted chiefly of manacles and the lash (Keedy, 1910: 25).

Those cases that were tried during this time period, where insanity was offered as a defence, were interesting from two standpoints. The reports of the case tell a great deal about the offenders's mental condition and they also

illustrate the tests by which the incapacity was determined.

Of those cases the first of importance was Arnold's case. He was indicted for feloniously shooting and wounding Lord Onslow. He was considered a madman, who suffered from a delusion that Lord Onslow was responsible for many of the problems existing in the country (Crotty, 1924: 114). He also felt that Onslow caused devils and imps to visit him nightly to plague and persecute him (Whitlock, 1963: 15). During the summing up in the Arnold case the reason given for exempting the insane from punishment was plainly utilitarian. Punishment is intended to deter others, but punishing a madman does not serve as an example to the rest of society (Jacobs, 1971: 27).

Mr Justice Tracey commented on the prisoner's defence of insanity in the following terms, "It is not every kind of frantic humour or something inaccountable in a man's actions that points him out to be such a madman as is exempted from punishment: 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 a wild beast" 4

4. Frances Whitlock, Criminal Responsibility and Mental Illness. London, England: Butterworths, 1963, p. 15.

If someone is deprived of reason he is consequently deprived of his intention and then is not guilty (Jacobs, 1971: 27). This attitude was a reflection of the popular attitude toward the insane at this time (Keedy, 1910: 25), however, efforts were still being made to introduce partial insanity as a defence (Gray, 1971: 559). Despite this view Arnold was found guilty and sentenced to death however, his victim, Lord Onslow had his sentence commuted to life (Whitlock, 1963: 15).

The defence of partial insanity was raised in 1760 in the case of R v Lord Ferrers. Ferrers was indicted for murder and the testimony from witnesses and medical experts showed that he was occasionally insane and incapable of knowing what he did (Crotty, 1924: 115). At the trial the jury was told that if the defendant was able to comprehend the nature of his actions and could discriminate between right and wrong then he should not be acquitted (Keedy, 1910: 25). Apparently this was the view adopted by the jury since Ferrers was found guilty and executed (Crotty, 1924: 115).

Both cases (Arnold and Ferrers) seem to show that the jury appears to have had a choice in such cases when it came

to returning a simple acquittal on the grounds of insanity (Jacobs, 1971: 32).

The next significant case that dealt with insanity as a defence occurred in Britain in 1800. James Hadfield was a soldier who attempted to assassinate the King. His bravery as a soldier had been noted and he had also suffered head injuries while in battle (Gray, 1971: 565). Hadfield had suffered from the delusions that he was the saviour of mankind and thus must sacrifice himself in order to gain world wide recognition. However suicide would not achieve this end so he concluded that an assault on the life of the King would result in his execution and he would be viewed as a martyr (Simon, 1967: 18).

Hadfield's defence was insanity based on the view that his fixed delusions were the direct cause of the attempted homicide. If those delusions had not existed the crime would not have been committed. The case was prosecuted by the Attorney General who appealed to the doctrine put forth by Hale: that total deprivation of memory and understanding is the only grounds for exemption from punishment (Singer and Krohn, 1924: 286). Hadfield was eloquently defended by Sir Thomas Erskine who refuted the prosecution's position by

arguing that no one but a helpless idiot would satisfy the test (Jacobs, 1971: 28). Hadfield clearly knew the nature of his act: firing a loaded horse pistol at the King and he knew the quality of his act: high treason (Stephen, 1883: 159). Erskine argued that a man could know right from wrong but if the criminal act was produced by his mental condition he should not be held legally responsible (Simon, 1967: 33). Erskine focused his defence on Hadfield's delusions and hallucinations, pointing out that "delusions where there is no frenzy or raving madness, is the true character of insanity". He also relied on other information about Hadfield, namely his head injuries and his behaviour on the day of the assault as observed by friends and relatives (Whitlock, 1963: 15).

As a result of Erskine's persuasive and logical arguments it was the first time in a English criminal court that the relationship between crime and insanity was discussed in a thorough and enlightened way (Ray, 1838: 29). Upon the basis of Erskine's reasoning and the clear evidence of Hadfield's insanity at the time the crime was committed Chief Justice Lord Kenyon stopped the trial and recommended acquittal (Whitlock, 1963: 16).

In his direction to the jury he said, "With regard to the law, as has been laid down there can be no doubt upon earth; to be sure, if a man is in a deranged status of mind at the time, he is not criminally answerable for his acts: but the material part of this case is whether at the very time when the act was committed, the man's mind was sane." 5

Consequently Hadfield was found not guilty. Hadfield's trial and the subsequent outcome was significant for a number of reasons. It denied the previously held belief that the defendant must be totally deprived of all mental faculties in order to be acquitted. It also severed the assumed tie between insanity and the ability to distinguish right from wrong (Simon, 1967). One of the more tangible consequences of Hadfield's trial and acquittal was the passing of the Criminal Lunatics Act (1800) (Whitlock, 1963: 16).

The act provided that the only verdict open to the jury in such cases was not guilty on the grounds of insanity, and that on the return of this special verdict kept in strict custody in such place and in such manner as to the court shall seem fit; until His Majesty's pleasure be known; whereupon it would be for His Majesty to give orders for his custody. 6

5. Ibid p. 16.

6. F.J. Jacobs, Criminal Responsibility. London, England: Wiendenhoff and Nicolson, 1971, p. 32.

Insanity was the issue once again in two less successful cases tried before the English Courts in 1812. The first defendant Parker, was considered feeble-minded and indicted for high treason as a result of his desertion from the British Army. According to the jury at the time he did desert he had, enough intelligence to distinguish between right and wrong and thus was guilty (Crotty, 1924: 115). In the second case, Bellingham shot the Prime Minister Spencer Percival. Despite evidence showing his paranoid and delusional state he was found guilty and executed (Whitlock, 1963: 16).

It was not until the year 1840 that the British courts saw insanity being pleaded successfully as a defence. Edward Oxford was an eighteen year old barman who shot at Queen Victoria and the Prince Consort. As was the case with Hadfield; Oxford also suffered from delusions. The evidence with respect to his delusions was sufficient to convince the jury that he was deranged at the time of the incident. He was found not guilty and confined to an asylum for many years (Whitlock, 1963: 17). It was this case that showed a degree of acceptance for the notion that a man whose mental illness prevented him from controlling his behaviour should not be found criminally responsible (Verdun-Jones, 1979b: 36).

Chapter 4

The McNaghten* Rules

The landmark case that changed the law on and attitudes towards insanity as a defence occurred in 1843 in England. Daniel McNaghten shot and killed Mr Edward Drummond, the private secretary of Prime Minister Robert Peel. The shooting of Mr. Drummond was actually an error, McNaghten's intended victim was the Prime Minister, whom he mistook Drummond for. McNaghten was a psychotic who believed he was being persecuted by the British Tory party (Gunn, 1977: 323). He was entangled in an elaborate system of delusions believing that Peel was responsible for the financial and personal misfortunes that continually plagued him (Simon, 1967: 20). He also felt his life was in danger as a result of the persecution to which he had been subjected (Whitlock, 1963: 17).

McNaghten's delusions were the basis of his defence. According to the medical evidence a person who is otherwise of sound mind might be affected by delusions and this was the case with McNaghten. A person labouring under a marked

* also referred to as McNaughton and McNaughten

delusion might have a mental perception of right and wrong but as far as McNaghten was concerned it was a delusion which carried him away beyond the power of his own control and left him no such perception (Colvin, 1981: 153). In other testimony it was stated that the delusion deprived McNaghten of all restraint over his actions that at the time of the shooting he had no self control (Keedy, 1917: 559).

McNaghten was defended by Alexander Cockburn who placed great emphasis upon the writings of the renowned American psychiatrist Issac Ray. It was Ray's belief that the insanity tests employed by the courts were too narrow given the state of medical science at that time (Clyne, 1973: 3). Cockburn also borrowed from Sir Thomas Erskine, the lawyer that had eloquently defended James Hadfield at his trial in 1800. Like Erskine, Cockburn also relied not on a defect of knowledge of judgement but on a lack of control (Jacobs, 1971: 29). Mr. Cockburn also traced the history of McNaghten's delusional beliefs related them to the offence and dealt with the law regarding insanity (Whitlock, 1963: 18). His job was to persuade the judges to accept a test of insanity that was not really recognized by the law, without allowing them to realize that was what they were doing (Whitlock, 1963: 3).

Lord Chief Justice Tindal instructed the jury to decide whether the defendant, at the time of the commission of the offence did or did not have the use of his understanding to know that the act he was committing was wrong (Gray, 1971: 565).

If he was not sensible at the time he committed that act, that it was a violation of the law of God and of man, undoubtedly he was not responsible for that act. 1

The jury returned a verdict of not guilty by reason of insanity. Their opinion was based on the view that McNaghten could not distinguish between right and wrong (Falk, 1964: 334). He was committed to Broadmoor mental institution where he remained until his death (Simon, 1967: 21).

Due to the importance of the victim and the intended victim the verdict was not a popular one and was criticized by many. England was in a political ferment and at that time several attempts had been made on the lives of royalty (Douglas, 1956: 486). Queen Victoria herself came out

1. Edwin Keedy, "Insanity and Criminal Responsibility" in Harvard Law Review (1917) Volume XXX, Number 6 p. 556

against the verdict when she said, "She did not believe that anyone could be insane who wanted to murder a Conservative Prime Minister" (Simon, 1967: 2).

Since the public and the Queen were so disturbed by the verdict the Crown exerted its influence on the House of Lords to obtain the opinions of the judges as to the law governing such cases (Douglas, 1956: 486). The House of Lords debated the decision and posed five questions to the justices of the Queen's Bench. * The questions concerned the standards for acquitting an insane defendant (La Fave and Scott, 1972: 275).

A portion of the judge's answers has come to be the most widely accepted test for the type or degree of mental disorder which will absolve a person from criminal responsibility. The majority of the justices stated, "To establish a defence on the grounds 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". 2

2. W. La Fave and W. Scott, Handbook on Criminal Law, St. Paul, Minn., West Publishing Co.; 1972, p. 275

* See Appendix I

This opinion given by the justices has become known as the McNaghten Rules which are still in effect in many parts of the world. The Rules have always been very difficult to apply, indeed even McNaghten himself would not have met the criteria if stringently applied (Gunn, 1977: 323).

A literal interpretation of the McNaghten Rules seems to refer to a certain mental disability which must produce one of two conditions both defined in terms of lack of cognition. Therefore, the Rules revolve around two elements: 1) the disability; a defect of reason; from disease of the mind and 2) the result; not knowing the nature and quality of the act or that it was wrong, at the time of its commission (La Fave and Scott, 1972: 275).

Although the Rules seem straightforward enough the terms are ambiguous and have been debated extensively for a hundred years. When taken separately, each of the elements included in the McNaghten Rules present their own unique and specific problems which have never been given a proper explanation or clarification.

One of the major elements that must be proved in order to successfully plead insanity as a defence is that the accused was suffering from a disease of the mind. There is

no generally accepted definition of what exactly qualifies as a disease of the mind (Whitlock, 1963: 29). It does appear however, that only mental abnormality whether it takes the form of a psychosis, neurosis, organic brain disorder or congenital intellectual deficiency will suffice (La Fave and Scott, 1972: 275). Not every case of organic disease of the brain will result in an acquittal under the Rules. It is generally agreed that the major psychoses are considered diseases of the mind (Whitlock, 1963: 29).

The terms found in the second branch of the McNaghten Rules are also ambiguous and have been the subject of debate and criticism. The Rules require that the accused not know the nature and quality of the act he was doing or if he did know it; that he did not know it was wrong. The word "know" has been interpreted as referring only to intellectual awareness. However, this is somewhat unrealistic since few if any individuals have existed who do not have any intellectual awareness with respect to their actions. According to Professor Henry Weihofen the knowledge test would be met if the word know was broadened to require knowledge being "fused with affect" and assimilated by the whole personality (Rubin, 1965: 57).

The term "nature and quality of the act" has been taken

to mean the same thing as the ability to know. In many jurisdictions where a modified version of McNaghten is applied the test states that the defendant have the ability to distinguish between right and wrong. The McNaghten justices did not clarify what they meant by the word wrong. It appears that if the defendant does not know the nature and quality of his act then he could hardly know that it was wrong, regardless of how the word know is interpreted (La Fave and Scott, 1972: 276). The term is completely ambiguous and may refer to a legal or moral wrong. It is an important distinction for there may be such a thing as an illegality not involving moral guilt (Stephen, 1883: 159). After McNaghten's case English decisions gradually resulted in a redefinition of the word "wrong" as meaning "legally wrong" (Verdun-Jones, 1980: 38).

Although the responses given by the justices to the House of Lords established a criterion of criminal responsibility of the insane it is believed by most legal historians that this was not their intention (Simon, 1967: 25). The judges were merely attempting to state the law of England at that period in time (La Fave and Scott, 1972: 280). Both the "right and wrong test" and the "delusion test" laid down by the judges were statements of the medical

and psychological theories prevalent at that time (Keedy, 1911: 522). The judges phrased their test in accordance with the two elements that constitute a crime: a prohibited act (actus reus) and a criminal intent (mens rea). According to the judges if the defendant could not do the act or form the intent by reason of medical insanity he has not done what the statute requires and therefore is not guilty (Meuller, 1960: 105).

The effect of the Rules was almost to assimilate the defence of insanity to the pleas of ignorance or mistake which afforded a defence under the ordinary doctrine of mens rea as it applied to the sane: the only difference was that under the McNaghten Rules the ignorance or mistake had to be the result of a defect of reason due to disease of the mind. 3

The McNaghten case was not responsible for making new law it was however, a restatement of an existing legal proposition and it is the case whose language is generally followed (Rubin, 1965: 2). The case was also unique from the standpoint that it was the first time that the testimony of psychiatrists as experts in the field of mental disease

3. F.J. Jacobs, Criminal Responsibility, London, England: Wiendenhoff and Nicolson, 1971, p. 30

and deficiency was accorded special status (Gray, 1971: 566). However, the McNaghten Rules require medical witnesses to testify in terms they find artificial and confining (Sobeloff, 1955: 877) thus restricting psychiatric testimony. The Rules do not allow for the application of modern psychiatric knowledge (Arboleda-Florez, 1978: 24). Another complaint is that the McNaghten test forces psychiatrists to make moral, ethical and value judgements with respect to the accused's ability to distinguish right from wrong (Kessler, 1982: 13)..

This criticism may be based upon a misunderstanding of what is being asked of the experts... "The psychiatrist is not being called upon to respond to the ethical question of what is right or wrong, but only to indicate whether the defendant was able to make moral and ethical discriminations." 4

A more real criticism is that, although one may know that what he is doing is wrong, he may be unable to prevent himself from doing it (Colvin, 1954: 682).

Some in the field of psychiatry do not recognize the

4. W. La Fave and W. Scott, Handbook on Criminal Law. St. Paul, Minn., West Publishing Co., 1972, p. 282.

concept of mental disease mainly because there are no fundamental grounds in medical doctrine for justifying a definition of the term. When forced by a legal test such as the McNaghten Rules the psychiatrist usually defines the concept in terms of psychosis, if in fact one is present (Beck, 1967: 317). However, the McNaghten Rules are often criticized since in some cases the seriously psychotic individual is held legally responsible for the crime, whereas in other cases, such a person is found not guilty by reason of insanity (Rubin, 1965: 18). The Rules assume that a person may be insane in some respects yet sane in others. This is nonsense from a medical view point because the mind is one and indivisible, therefore such a person does not exist (Martin, 1966: 242).

The McNaghten Rules are also criticized with respect to the issue of responsibility in that it does not allow for the person who, although he knows what he is doing and may in some sense know that it is wrong, nonetheless he is unable to help himself (Jacobs, 1971: 35). This is often the case with a seriously mentally ill person (Martin, 1966: 242).

On the basis that "ought" implies "can", a person is not responsible for what he cannot help doing; yet a person who has the requisite knowledge cannot under the McNaghten formula escape responsibility for his acts. 5.

The McNaghten Rules could constitute the basis for a viable test of criminal responsibility if it were more broadly interpreted. The Rules require the mind to be regarded as consisting of a number of unconnected functions where emotional and volitional faculties are separate from the defendant's reasoning powers. According to Sir James Stephen there is a need to examine the defendant's capacity to reason about the moral character of his act (Verdun-Jones, 1980b: 21).

One criticism of the McNaghten Rules is that it defines insanity solely in terms of cognitive capacity. This limitation makes the test the most restrictive of those dealing with criminal responsibility.

5. F.J. Jacobs, Criminal Responsibility, London, England: Wiendenhoff and Nicolson, 1971, p. 35

As stated by one court the thrust of the McNaghten formulation is that "... there is a separate little man in the top of one's head called reason whose function it is to guide another unruly little man called instinct, emotion or impulse in the way he should go. 6

Insanity does not only or primarily affect the cognitive or intellectual faculties but affects the whole personality including both the will and emotions (La Fave and Scott, 1972: 280). Rather than looking at the whole picture the test reflects a traditional notion of a compartmentalized personality. Most psychiatrists disagree with this view and see the personality as an integrated unit (Morris, 1970: 11). In addition the test ignores the possibility of emotional or volitional impairment and the role of the unconscious (Schiffer, 1978: 145).

According to the Rules the accused must be suffering from a disease of the mind in order to be exempted from criminal sanctions. This requirement has led to some problems. In a 1874 case Mr. Justice Blackburn noted that there is an insuperable difficulty in devising a

6. Grant Morris, The Insanity Defense: A Blueprint for Legislative Reform, Toronto, Ontario: Lexington Books, 1970 P. 11

satisfactory definition of insanity (Whitlock, 1963: 42). Although the term allows for leeway in interpretation it does prevent acquittals based solely on the presence of mental illness at the time the crime was committed (Gray, 1972: 567). In addition to being vague and uncertain the Rules do not take into account disorders that manifest themselves largely in disturbances of the impulsive and affective aspects of mental life (Glueck, 1962: 48). No provisions were made for those who carried out criminal acts while under the influence of an irresistible impulse (Whitlock, 1963: 42).

The narrow interpretation of McNaghten led to two major erroneous consequences:

- 1) the words of the test came to be interpreted as requiring a cognitive understanding of the difference between right and wrong
- 2) the concept of "disease of the mind" came to be held by some psychiatrists to encompass only psychosis itself. 7

It appears that in today's society the McNaghten Rules are somewhat outdated. The first branch of the test is practically obsolete since there are few lunatics running about at large. Anyone who does not know the nature and

7. Sheila Gray "The Insanity Defense: Historical Development and Contemporary Relevance" in The American Criminal Law Review 1971-72, Vol. 10. p. 568

quality of his act can not know at all what he is doing and will more than likely remain in that mad state until the trial and will in all probability be found unfit (Devlin, 1954: 678). Professor Jerome Hall sees the first wing of the test as a way of defining an elementary criterion of rationality... a rational person is a sane person (Rubin, 1965: 19). According to American judge David Bazelon, "The most distressing thing about McNaghten is that it sets a standard of rationality which all but the most extreme psychotics and drooling idiots can meet (Szasz, 1963: 96).

Of the second branch of McNaghten Hall says it expects an ordinary person to do what philosophers through the ages have attempted to do; distinguish right from wrong - a difficult task indeed (Rubin, 1965: 19). However, despite his criticisms Hall considers the Rules workable, believing psychiatrists can contribute constructively to the conduct of the criminal law (Szasz, 1963: 101).

How the jury interprets the McNaghten Rules plays an important role in its application. Lord Cooper of the Royal Commission on Capital Punishment believed in all probability that most jurors ignore all the directions given to them by the presiding judge and simply concentrate on the issue of

insanity. He agrees with Justice Frankfurter's opinion that the Rules are a "sham" if the jury ignores the proper interpretation (Whitlock, 1963: 9).

Although the McNaghten Rules have been analyzed and criticized almost since their inception in 1843 there are some who support them. It has been argued that the objectives of the criminal law are better served by a test of insanity which concerns itself with perception rather than self-control (La Fave and Scott, 1972: 281). This is the case with McNaghten.

The British Medical Association's evidence before the Royal Commission on Capital Punishment (1950) favoured retaining the McNaghten Rules with the addition of a provision for insane impulse (Williams, 1954: 20). In a 1954 lecture Mr. Justice Devlin stated that the McNaghten Rules remained as good a test of criminal responsibility as they were in 1843 (Burke and Allsop, 1954: 657). Reluctance to change the Rules may be due to the fear that broadening the test would increase the instances of violators (supposedly) escaping punishment via an insanity plea (Sobeloff, 1955: 879).

The McNaghten Rules were the test of criminal responsibility in the courts in United States for almost a hundred years. Some American jurisdictions have retained the Rules or apply a somewhat modified version. In 1929 the District of Columbia broadened the Rules to include irresistible impulse (Gray, 1972: 569). In Britain, in 1960 the Privy Council stated, "At various times in the past attempts have been made to temper the supposed harshness or scientific nature of the McNaghten Rules... but in the end, the Rules remain in full force" (Clyne, 1973: 22).

As a community we must make up our minds on the general ethical question whether insanity per se should exempt; and if we think it should we must find the best tribunal for deciding the question of insanity. 8

8. Glanville Williams, "The Royal Commission and the Defence of Insanity" in Current Legal Problems, 1954, p. 26

Chapter 5

The Post-McNaghten Years: Other Tests of Criminal Responsibility

The early tendency in the United States was to follow the law as laid down by the English Courts and with respect to insanity as a defence the McNaghten Rules were adopted (Crotty, 1924: 122). Many states broke away from McNaghten in two ways; by taking a more flexible view of the doctrine by precedent or by statute (Clyne, 1973). In the Massachusetts case of the Commonwealth v Rogers (1844) the instructions given to the jury amounted to the right/wrong test. In addition the court held that the test was satisfied and therefore the defendant is excused if his actions were due to an irresistible impulse and therefore he is not a free agent (Crotty, (1924: 122).

The New Hampshire Test

Two states openly declared that McNaghten was out of date and did not follow it (Clyne, 1973). The first state to reject the test was New Hampshire. In 1868 Joseph Pike killed Thomas Brown in the course of a robbery (Simon, 1967: 795). Pike's defence was insanity. The court was influenced by the writings of Dr. Isaac Ray, when they held

that a defendant was to be found not guilty by reason of insanity if his crime was the offspring or product of mental disease. According to Ray, "Insanity is never established by a single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case" (La Fave and Scott, 1972: 28).

The New Hampshire court was the only one which heeded Dr. Ray's work in applying the tests of criminal responsibility that: "At the trial where insanity is set up as a defence two questions are presented: 1) had the prisoner a mental disease, 2) if he had, was the disease of such a character or was it so far developed, or had it subjugated the powers of mind, as to take away the capacity to form or entertain a criminal intent?" 1

In the Pike case it was Justice Charles Doe who argued that the McNaghten formula was false and should be rejected (Sobeloff, 1955: 995). He saw insanity as a problem of evidence not of substantive criminal law and viewed the McNaghten Rules as an unwarranted presumption of law which presumes a man is sane unless he is unable to meet the standard of rationality arbitrarily set by the court (Parker, 1967: 331).

1. Graham Parker, "The Decline of Daniel McNaghten" in Criminal Law Review, 1967, p. 331.

The New Hampshire Rule has been the target of both praise and criticism. The major criticism being that the jury is left without sufficient guidance with respect to the critical issue of responsibility (La Fave and Scott, 1972: 287). The court recognizes that an accused is not criminally responsible if his unlawful act was the result of mental disease or defect. The issue of insanity becomes a matter of fact to be determined in the same manner as other issues of fact (Sobeloff, 1955: 794). The jurors must in turn relate medical knowledge to whether the defendant is guilty of a specific crime, consisting of specific elements (Mueller, 1967: 107). "Thus the New Hampshire test is strictly pragmatic; it is all a question of fact to be decided by the jury as to what constitutes insanity." 2

Before 1800, under the common law of England an insane defendant was simply acquitted (Devlin, 1954: 676). After that year several significant cases were heard that changed the law relating to insanity as a defence, including the McNaghten case. After McNaghten, the decision handed down in England consistently followed the right/wrong test that

2 G. Mueller, "McNaghten Remains Irreplaceable: Recent Events in the law of Incapacity". in The Georgetown Law Journal, Vol. 50, 1960-61, p. 108.

had been laid down in that particular case (Crotty, 1924: 120). Until the year 1883 the verdict was still an acquittal but given specifically on the grounds of insanity. The last verdict of not guilty on these grounds was handed down in England in 1882 (Devlin, 1954: 676). Roderick MacLean fired a pistol at Queen Victoria at the Windsor Railway Station. He was tried for high treason, found not guilty on the grounds of insanity and sent to Broadmoor. Queen Victoria was indignant upon hearing the verdict and summed up her feelings with the following comment, "Insane he may have been, but not guilty he certainly was not as I saw him fire the pistol myself" (Whitlock, 1963: 43). This particular case led to a special verdict under the Act of 1883.

The Act repealed Section 1 of the Criminal Lunatics Act, 1800, which had required the jury to return a verdict of not guilty on the grounds of insanity, substituting instead that the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission. 3

3. Frances Whitlock, Criminal Responsibility and Mental Illness. London, England: Butterworths, 1963, p. 44.

In addition to the Criminal Lunatics Acts, the Trial of Lunatics Act (1883) also had some bearing on the management and disposal of those who fell within the framework of the McNaghten Rules (Whitlock, 1963: 43).

This Act provides that when in the trial of a person charged with an offence, evidence was offered to show that the person was insane, so as not be responsible according to law at the time when he did the act, then, if it appears to the jury before whom he is tried that he was insane when he did the act, they shall return a special verdict to the effect that the accused was guilty of the act but insane at the time. 4

The Irresistible Impulse Test

Rather than totally abandoning the McNaghten Rules a number of jurisdictions supplemented them with the Irresistible Impulse test (La Fave and Scott, 1972: 269). No jurisdiction uses the test as the sole standard of criminal responsibility. According to the Irresistible Impulse Doctrine an individual is not criminally responsible if he had a mental disease that kept him from controlling his conduct despite his knowledge of the nature

4. Homer Crotty, "The History of Insanity as a Defence to Crime in English Criminal Law", in California Law Review, 1923-24 #12 P. 120.

and quality of his act and his awareness that it was wrong (Morris, 1970: 13).

The notion of an Irresistible Impulse test pre-dates McNaghten and first appeared in the American case of the Commonwealth v Rogers, 1844. It was accepted in a few jurisdictions in the 1860's but the leading judicial exposition of the test came in the Alabama case of Parsons v the State, (1887) (La Fave and Scott, 1972: 284). In this case the court stated that, "the disease of insanity ... can so affect the mind as to abvert the freedom of the will and thereby destroy the power of the victim to choose between right and wrong, although he perceived it" (Phelps, 1977: 89).

The Irresistible Impulse test grew in popularity and received praise from those who believed that McNaghten standing alone was too restrictive, not taking into consideration the defendant who was unable to control his conduct. In England however, the judges continued to instruct the jury according to the right/wrong test believing that irresistible impulse was a most dangerous doctrine (La Fave and Scott, 1972: 283). Critics of the test saw it as being too restrictive because it covers only impulsive

committed and requires a total impairment of volitional capacity (La Fave and Scott, 1972: 285). Chief Judge David Bazelon asserts that the Irresistible Impulse test 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" (Morris, 1970: 13).

In the English case of True, in 1922 the Court of Appeal rejected the view of the trial judge that the jury could return a finding of insanity if they thought he had been deprived of the power of controlling his actions. True was subsequently reprieved and the ensuing outcry led to the appointment of the Atkin Committee on Insanity and Crime (Jacobs, 1971: 36). The Committee was chaired by Lord Atkin and their mandate was to consider the law relating to insanity and crime and the working of the Criminal Lunatics Act. They heard evidence from the British Medical Association and the Royal Medico-Psychological Association and submitted their report in 1923 (Whitlock, 1963: 46).

The unanimous conclusions of this committee were: 1) The criteria of responsibility expressed in the rules in the McNaghten case should be abrogated, and the responsibility should be left as a question of fact to be determined by the jury. 2) In every trial in which the prisoner's mental

condition is at issue the judge should direct the jury to answer the question: a) did the prisoner commit the act alleged, b) if he did was he at the time insane, c) if he was insane has it been proved that his crime was unrelated to the mental disorder. 3) When a prisoner is found unfit to plead, the trial on the facts should be allowed to proceed. 4) The verdict "guilty but insane" should rank as a conviction for purposes of appeal. 5) A panel of experts should be appointed, any of whom can be called to give evidence when insanity is raised as a defence. 5

In addition the Committee recommended that it should be recognized that a person charged with a crime is not responsible for his act, when the act is committed under an impulse which the prisoner was, by mental disease in substance deprived of any power to resist (Jacobs, 1971: 37). Thereby the Committee was recognizing the existence of irresistible impulse with respect to criminal behaviour. Despite the efforts by Lord Darling to implement the Committee's recommendations in the form of the Criminal Responsibility (Trials) Bill the government took no action. In 1931 the Select Committee on Capital Punishment also looked at the area of criminal responsibility in the case of the mentally defective and those who labour under some

5. H.D. Singer and William Krohn, Insanity and Law, Philadelphia, Pennsylvania, Blackstone and Son, 1924, p. 294

distinct form of insanity. As with the Atkin Committee's Report no action was taken by the government (Whitlock, 1963: 50).

The reference in the McNaghten Rules to the appropriate standard of wrongfulness was ambiguous and in a 1952 case the controversy erupted. The English Court of Criminal Appeal in R v Windle held that "wrong" meant legally wrong not morally wrong (Colvin, 1981: 2).

In the opinion of the court there is no doubt that in the McNaghten Rules "wrong" meant contrary to law and not "wrong" according to the opinion of one man or a number of people on the question of whether a particular act might or might not be justified. 6

Other Commonwealth countries were experiencing their own difficulties with the McNaghten Rules and consequently interpreting them somewhat differently. The High Court of Australia in the 1952 case of Stapleton v the Queen rejected the interpretation offered in the Windle decision (Colvin, 1981: 3). The court decided it was morality and not legality which lay as a concept behind the judges use of "wrong" in the McNaghten Rules (Morris, 1970: 436). Not

6. Eric Colvin, "Ignorance of Wrong in the Insanity Defence" in the University of Western Ontario Law Review, Vol. 19 #1, 1981, p. 3

only did the court define it as meaning "morally" rather than "legally wrong" but also emphasized the critical importance of examining the question whether the defendant has the capacity to distinguish between "right and wrong" (Verdun-Jones, 1979b: 32). It was decided that for a man to be legally sane he must know his act was wrong according to the ordinary standards adopted by reasonable men (Bloom, 1969: 272). Though diametrically opposed both Windle and Stapleton have been accepted as authoritative interpretations within their respective jurisdictions (Colvin, 1981: 3).

While Windle and Stapleton were being decided the issue of insanity and the law was being raised once again by the British Royal Commission on Capital Punishment * (1949-53). After careful inquiry, research and hearing evidence from experts in the field, the Commission concluded that the test of criminal responsibility set out in the McNaghten Rules was so defective that it ought to be changed (Report of the Royal Commission (Canada), 1956: 68).

The McNaghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does

* Also referred to as the Gower Commission

not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law but yet commit it as a result of the mental disease. 7

The commission also recommended that when a person is found to be so severely disordered as to be certified as insane there is a strong presumption that the crime was wholly or largely caused by his insanity (Whitlock, 1963: 6). It should be left up to the jury to decide if the accused was suffering from a disease of the mind or mental deficiency at the time the act was committed. If so, was it to such a degree as to deem him not responsible (Report of the Royal Commission (Canada), 1956: 69).

The Durham Rule

In 1954 the McNaghten Rules were broadened almost to the point of non-existence in the District Columbia case of *Durham v the United States* (Gray, 1970: 570). The defendant Monte Durham had been convicted of housebreaking and pleaded insanity.. The twenty-six year old had a long

7. Grant Morris The Insanity Defense: A Blueprint for Legislative Reform, Toronto, Ontario: Lexington Books, 1970. p. 11

history of mental disorder and petty thievery. He had spent time in both prison and mental institutions (Simon, 1977: 33). The psychiatrist testified at the trial that he was suffering from psychosis, heard voices, hallucinated and felt his co-workers talked about him (Rubin, 1965: 3). The trial judge rejected Durham's defence of insanity and convicted him (Glueck, 1962: 85), the United States Court of Appeals for the District of Columbia held that Durham was not criminally responsible (Falk, 1964: 339).

...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
 b) it is based upon one symptom and so can not validly be applied in all circumstances. The rule we now hold must be applied on the retrial of this case and in future cases is not unlike that followed by the New Hampshire court since 1870. It is simply that the accused is not criminally responsible if his unlawful act was product of mental disease or defect. 8

Judge David Bazelon

Thus the Court of Appeal adopted a new test of criminal

responsibility to provide the jury with "wider horizons of knowledge concerning mental life" (Kessler, 1982: 3). Unfortunately the Durham Rule makes no attempt to define with precision the terms "mental disease" and "mental defect" (Douglas, 1956: 488). Judge Bazelon attempted to clarify this problem when he said, "We use "disease" in the sense of a condition which we considered capable of either impairing 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 (Weisstub, 1980: 603).

The right/wrong test was viewed as inappropriate as the sole determinant of criminal responsibility (Weisstub, 1980: 604). The Durham Rule was seen as being broader than McNaghten since it allowed defect in either volition or cognition to constitute a defence (Schiffer, 1978). The critical difference of the two rules is that Durham encompasses more and thus exculpates more defendants (suffering from mental disease or defect that caused them to commit the crime) than does McNaghten (so mentally disordered as not to know what they were doing or that it was wrong). One study showed that between the year 1952 and

1961 in the District of Columbia acquittals by reason of insanity rose from less than 1% to more than 14%. However, even such results are not necessarily attributable to the change in the insanity test formulation and could be a result of other variables such as changing crime rates or jury attitudes. (Morris, 1970: 23). The latter hypothesis was tested in the study "The Jury and the Defence of Insanity" conducted by Rita Simon (1967) (Phelps, 1977: 99). She sampled 1,176 jurors from three large American cities. They listened to a recorded tape of a trial and were then instructed in either the McNaghten or Durham formulation (Morris, 1970: 23).

They then gave verdicts based upon both instructions. After this they were asked to show their preferences for one test or the other, or to say that there was no real difference between the two:

33% favoured McNaghten
35% favoured Durham
31% felt there was no difference

While it may be that both tests are equally appreciated, the greater the likelihood is that jurors are unable to grasp the difference in the two tests. 9

9. Michael E. Phelps, "The Search for Optimum Definition of Criminal Insanity - The American Experience." in Criminal Reports, 1977, Vol. 37, p. 99

Justice William O. Douglas saw the Durham Rule as a great improvement over the rigid McNaghten test. He said, "To most psychiatrists the Durham decision was a break with legal traditions that was long overdue. It has the great advantage of permitting the psychiatrist to speak to the court and to the jury in the language of his discipline" (Hall, 1963: 961). The jury is aided in their decision making process by the psychiatrist who may talk, unfettered by arbitrary legal formulae. They pass no moral judgement of guilt but focus on the theoretical and clinical aspects of the problem. It is then the jury's task to evaluate the psychiatric testimony in the same manner as other factual issues (Douglas, 1965: 489). It was for this reason that the psychiatric profession responded to the new rule enthusiastically, eager for this chance to bring their expertise into the courtroom (Kessler 1982: 3). No one theory of psychiatry is turned into a principle of law (Douglas, 1956: 490), instead the psychiatrist will have before him a fuller psychiatric opinion and will be more likely to reach a decision (Savage, 1968: 295).

Critics of Durham saw it as a "non-rule" providing the jury with no standard to judge the evidence leaving them

dependent upon expert testimony (La Fave and Scott, 1972: 288). The vagueness of the rules leaves the jury without guidance (Glueck, 1962: 96), they cannot determine how much of a "disease" an accused must have suffered before being excused for his act (Falk, 1964: 334).

The jury must indeed be provided with a standard or formula by means of which it can apply the medical testimony to the ultimate legal question of whether the defendant possessed the requisite mental frame which the crime required. This is something the Durham test fails to do. 10

One area of criticism was that the Durham Rule did not sufficiently define the concepts of mental disease and defect (Glueck, 1962: 96). In deciding on Durham the court deliberately chose not to define the term mental disease so that expert testimony would not be inhibited (Morris, 1970: 15). However, this ruling failed to anticipate that mental disease or defect would prove more imprecise and lead to much disagreement over its interpretation. Conflicts were bound to arise over what constitutes mental disease, psychopathy, personality disorder or drug dependence (Roth,

10. G. Mueller, "McNaghten Remains Irreplaceable: Recent Events in ~~the~~ Law of Incapacity". in The Georgetown Law Journal, Vol. 50, 1960-61, p. 109.

1981: 92). When test cases arose raising these questions disputes about nomenclature began popping up (La Fave and Scott, 1972: 290). In moving from the term insanity to mental disease Durham loses touch with the concept of mens rea. Though mental disease may support insanity as a defence it can not stand alone as one (Rubin, 1965: 54). The criticism against the lack of definition of mental disease or defect led to two subsequent developments: the court has now announced a judicial definition of what is included in the terms and the court has recently developed guidelines to govern expert testimony on the issue. (La Fave and Scott, 1972: 291).

The concept of causality expressed in Durham uses the word "product" and has also been the subject of criticism. According to Kaufman the criterion of "product" raises near impossible problems of causation (Parker, 1967: 333). No effort was made to explain the meaning of this term either. The term has no clinical significance for psychiatrists so they should not speak directly in terms of "product" or even "result" or "cause" (La Fave and Scott, 1972: 291).

A symposium held in 1959 summarized the difficulties which had been experienced and psychiatrists were almost unanimously critical. It seems they object to the new rule on much the same ground as criticism against the old one. The notion that one's actions can be said to be the "product" of one's mental condition has turned out to be meaningless, as elusive and as "out of step" with advancing knowledge as the cognitive notions on which the McNaghten Rules were based. 11

In the decade following the Durham decision appeals heard before the United States Court of Appeal for the District of Columbia, involving the issue of insanity, realized that the many criticisms directed at the Durham Rule were not without substance (La Fave and Scott, 1972: 289). Practically every case in the state courts rejected Durham in favour of McNaghten and federal courts elsewhere have not adopted the rule (Rubin, 1965: 4). It appears that the principal contribution of the Durham Rule as a solution to the problem of insanity and the law demonstrates that there are no solutions (Goldstein, 1967: 213)..

The American Law Institute (ALI) Test

About a year after the Durham decision the American Law Institute's Model Penal Code project produced another test

11. P. Clyne, Guilty but Insane, London, England: Thomas Nelson and Sons Ltd., 1973 p. 31

of criminal responsibility (La Fave and Scott, 1972: 292). In the United States v. Currens (1961) the Court of Appeals for the Third Circuit recognized the inadequacies of Durham and adopted the test based on the ALI formulation (Gray, 1972: 571). The American Law Institute test provides that:

- 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 lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.
- 2) mental disease or defect do not include an abnormality manifested only by criminal or otherwise anti-social conduct (Hale, 1963: 961).

Those who drafted the code rejected Durham mainly because of its ambiguity with respect to the use of the word product (La Fave and Scott, 1972: 293). However, they did not totally reject McNaghten and the Irresistible Impulse doctrine and ALI is seen as a more sophisticated version of those two tests (Glueck, 1962: 68). McNaghten and Irresistible Impulse were seen as properly focusing upon impairment of cognition and impairment of volitional capacity (La Fave and Scott, 1972: 293).

In the United States v. Charles Freeman, the defendant was found guilty in the trial court for selling heroin. He

was sentenced to five years (Parker, 1967: 327). In 1966 the United States Court of Appeal (2nd Circuit) handed down a decision that it found McNaghten and Durham wanting and therefore substituted the ALI formula* (Martin, 1973: 134). According to the prosecution's psychiatric expert, Freeman realized the wrongfulness of his acts and possessed the capacity to enter into purposeful activity, in this case selling narcotics. Freeman did not fit into the structure of the McNaghten Rules, although he did not know right from wrong he did know that he was selling heroin (Parker, 1967).

The ALI test sees the mind as a unified entity recognizing that functioning can be impaired by mental disease in a number of ways (Verdun-Jones, 1979b: 323). It replaced the much criticized "know" of the McNaghten Rules with the word appreciates (La Fave and Scott, 1972: 293). This is important, in that mere intellectual awareness that conduct is wrong when divorced from appreciation or understanding of the moral or legal impact of behaviour, can have little significance (Verdun-Jones, 1979b: 323).

* Also referred to as the American Standard Rule or the Freeman Rule

Abraham Goldstein explains the ALI test as follows: "The test is a modernized and much improved rendition of McNaghten and the "control" tests. It substitutes "appreciate" for "know" thereby indicating a preference for the views that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct. And it uses the word "conform" instead of "control" while avoiding any reference to the misleading words "irresistible impulse." 12

The use of the word conform also avoids the impression of a suddenness associated with the act and provides juries with some specificity which was absent in the Durham Rule (Phelps, 1977: 97). It avoids the shortcoming of the Irresistible Impulse test that implies that the loss of volitional capacity can be reflected only in sudden or spontaneous acts as opposed to those accompanied by brooding or reflection (La Fave and Scott, 1972: 293).

Another departure from both McNaghten and Irresistible Impulse is that the ALI only required a lack of substantial capacity as opposed to the complete impairment of cognitive capacity for self-control necessary in the former tests (La Fave and Scott, 1972: 292).

12. Grant Morris, Legislative Reform, 1970, p. 18.

The Insanity Defense: A Blueprint for Toronto, Ontario: Lexington Books,

It seems that the ALI solution best represents psychiatric reality while at the same time providing substantial uniformity of verdict and guidance for the jury (Phelps, 1977: 97). It is praised for meeting the two objectives of a test of criminal responsibility; giving expression to an intelligible principle and fully disclosing this principle to the jury (La Fave and Scott, 1972: 294).

As with the other tests of criminal responsibility that preceded it, the ALI has received its share of criticism. It has been denounced for being vague and ambiguous. The ALI formula's use of the words "substantial capacity" and "appreciate" has been criticized on the grounds that they do not have a common, absolute meaning (La Fave and Scott, 1972: 294). According to Judge David Bazelon the terms are too entangled with the medical model to be usable as a legal concept (Morris, 1970: 18). The exclusion of the psychopath from the ALI's definitions of a mental disease has also been criticized (Phelps, 1977: 98).

In 1972 in the case of *Brawner*, the United States Court of Appeal for the District of Columbia favoured the ALI formula over the Durham Rule (Schiffer, 1978: 147)

In twenty-one of the United States the McNaghten Rules are the sole test of criminal insanity. In eleven of the remaining states it is one of the two tests used, the other being the so-called Irresistible Impulse Rule. While only two states employ the Durham Rule, seventeen states plus the two federal courts employ the American Law Institute solution. 13

In addition over thirty American states have passed sexual psychopath statutes (Petrunik, 1984). These statutes seem to be a response to public outcry and panic after a particularly heinous crime has been committed. As opposed to the McNaghten Rules, the sexual psychopath statutes look at the offenders' condition at the present time and not when the offence was committed, which in many cases is years beforehand (Clyne, 1973: 137).

Though the debate still centres on whether McNaghten should be discarded, whether the "control" tests are adequate, whether Durham or the ALI Rule should be adopted, these discussions have begun to change their form. It is slowly becoming clear that the words of the test are a small part of the process which includes, in addition the testimony of layman and experts, examination and cross-examination, argument and counter argument. The significance of any one of the competing formulae

13. Michael E. Phelps, "The Search for the Optimum Definition of Criminal Insanity - The American Experience".

turns on whether one formula leads a trial judge to admit more evidence than another to acquit or convict more persons. 14

The British Homicide Act

The British Homicide Act of 1957 took a somewhat different view of insanity and criminal responsibility. Based to some extent on a Scottish concept the Act requires that a person charged with murder shall have the charge reduced to manslaughter if his mental responsibility is substantially impaired (Falk, 1964: 339). Where other tests of criminal responsibility attempted to exempt the mentally ill offender from criminal responsibility the Homicide Act allows for a possible verdict of diminished responsibility. Most mentally abnormal offenders have been convicted of the lesser charge of manslaughter (Weston and Turner, 1981: 12). In order for the charge to be reduced it must be shown that the accused was suffering from such abnormality of the mind as to cause a substantial impairment of his mental responsibility (Roth, 1981: 94). The Act includes arrested or retarded development of mind as a

14. Abraham Goldstein, The Insanity Defence. New Haven, Conn., Yale University Press, 1967, p. 213.

factor leading to the impairment (Whitlock, 1963: 31).

Thus an accused who is not so impaired as to be found unfit, may still escape the rigors of the McNaghten Rules by pleading diminished responsibility (Clyne, 1973: 124). However, he does not escape punishment and is sentenced in the usual way with the judge exercising his discretion over the case. He is able to issue a "hospital order" under the Mental Health Act (Weston and Turner, 1981: 12).

One result of the Homicide Act has been the virtual disappearance of pleas of insanity.

Year Murder Charges

1954	60	22	guilty but insane
1955	79	13	
1956	79	18	
1976	149	2	not guilty by reason of insanity*
1977	162	1	
1978	130	0	

In 1958 there were twenty-five manslaughter convictions, while in 1978 with the addition of a diminished responsibility clause there were seventy-nine (Wooton, 1981: 88).

Neither the McNaghten Rules nor the Homicide Act implied any change in the objective of the penal system they were merely attempts.

* Refers to how the verdict now reads.

to adjust to contemporary conceptions of mental abnormality the principle that the punishment should fit the criminal as well as the crime. 15

The problem of the insane offender is not one that is unique to North America or Britain. It is useful to analyze the legislation applied in other enlightened nations for comparative purposes. Though McNaghten is still loosely applied in Britain, Canada and the United States it is not followed in Denmark, France, Belgium, Germany, Luxembourg, Finland, Scotland, Sweden and Norway. Both Sweden and Norway have left the concept of incapacity wide open. However, the courts have come to grips with reality in terms of the capacity to use one's senses to appreciate what one is doing and to control one's actions. Belgium, Luxembourg and France originally adopted tests somewhat similar to Durham but have since moved toward a formula that is not unlike the McNaghten Rules (Mueller, 1962: 114). The French have a very simplistic approach to the problem and this is reflected in their penal code, "There can be no crime nor offence if the accused were in a state of madness

at the time of the act" (Overholser, 1962: 350). The test applied in Germany is similar to the ALI formula (Mueller, 1962: 114). The Criminal Codes of Bavaria, Basile and Turin all included conditions of mind which the judge may consider as freeing one from responsibility. In the Criminal Code of Saxon, responsibility is annulled if the person is deprived of his reason by mental disease. Although the language is different the essence of the Codes of Switzerland, Russia and the Grand Duchy of Baden was basically the same (Overholser, 1962: 349).

The Criminal Codes of Queensland and Tasmania have added a third limb to the McNaghten test. In Queensland it is the capacity to control one's actions and in Tasmania they have added a condition for irresistible impulse. (Jacobs, 1971).

It appears that the problem of the insane offender is a universal one. Even though it is handled somewhat differently a familiar theme emerges: the mentally ill offender is not held responsible for his actions, how the details are ironed out is a matter of semantics and interpretation. The Canadian approach to the subject is outlined in detail in subsequent chapters.

Chapter 6

The Canadian Case: Legislation

On July 1, 1867 three provinces were united to form and be one Dominion under the name of Canada (Creighton, 1963: 33). The criminal law that was applied was essentially the same as that of the English mother country, including that aspect dealing with the defence of insanity. By 1843 the definitive test of criminal responsibility had been formulated by the House of Lords as a result of the McNaghten case. During the years 1867-1892, the insanity defence remained the same in Canada with one exception. The 1869 Act, which consolidated criminal procedure, made a provision for a special verdict required in a case which raised the issue of the defendant's sanity at the time of the commission of the offence, as well as the indefinite detention of a person acquitted by reason of insanity (Verdun-Jones, 1979b: 2). This was covered in Section 99 of the Revised Statutes of Canada 1869, Chapter 29 and read as follows:

In all cases where it is given in evidence upon the trial of any person charged with any offence, whether the same be treason, felony or misdemeanor, that such person was insane at the time of the commission

of such offence and such person is acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence and to declare whether he is acquitted by them on account of such insanity: and if they find that such person was insane at the time of committing such offence, the court before whom such trial is had shall order such person to be kept in strict custody in such a place and in such a manner as to the court seems fit, until the pleasure of the Lieutenant-Governor be known.

Between the years 1838 and 1880 the British Parliament appointed a number of commissions to report and draft a comprehensive code of the English Criminal law (Verdun-Jones, 1979b: 16). However, it was the 1880 Criminal Code Bill which attracted the attention of Canada's federal Minister of Justice, Sir John Thompson. After being introduced, modified and re-introduced, the Codification Bill was given Royal Assent in July of 1893 (Verdun-Jones, 1979b: 17). Section (11) made provisions for the defence of insanity and was the subject of some debate in the House of Commons. In the session on May 17, 1892, Mr. Mills, member for Bothwell, pointed out that the section was similar to the report of the judges in the much criticized McNaghten case. He made his position clear when he stated, "I think among scientific men the rule laid down by the

judges in the report of the McNaghten case has never been accepted." He felt alternatives to the McNaghten Rules should be considered and went on to say, "I would not like to see it embodied in a statute without very careful consideration because I am strongly of opinion that it is not sound." The Minister of Justice, Sir John Thompson, responded to Mr. Mills by saying, "We can never expect to arrive at an agreement on scientific principles in legislating on insanity in criminal matters; but I always understood the rules laid down in the McNaghten case to be accepted without question (Canada, 1892: 2707).

At the conclusion of the debate, Thompson defended his position by saying,

I should think that in a matter of such great difficulty and importance it would be very difficult for us to do anything else than to follow the existing law in the mother country which has been examined and criticized lately by such eminent men as those who prepared this enactment and that, though they were conscious of arriving at an unsatisfactory solution still it is the best that can be devised. I would prefer that we should follow the English Law on this subject instead of going to any foreign country for our law. 1

1. Canada, House of Commons Debates, 1892, p. 2711 .

His statement is significant since it shows the Canadian Government was quite prepared to accept the views of the English Law Commissioner as being definitive rather than to devise a Canadian solution to the problems raised by the insanity defence (Verdun-Jones, 1979b: 20).

Th provisions relating to the insanity defence appeared as Section (11) in the Criminal Code of 1892 and read as follows:

- 11 (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 render him incapable of appreciating the nature and quality the of 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 grounds 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.

Although the 1892 Code provisions relating to the insanity defence were based upon the McNaghten Rules there were also differences between the tests of insanity

enshrined in the Canadian and English law (Verdun-Jones, 1979: 20)

In the Canadian Codification the words of the McNaghten Rules were changed in three respects:

- 1) In subsection (1) the word "appreciate" was substituted in the first test for "know"
- 2) The word "and" was substituted for the word "or" between the two tests.
- 3) In subsection (3) the word "clearly" was omitted before the word "proved" 2

Another important change was the addition of "natural imbecility" as one of the factors that may draw the defendant within the words of the insanity defence; the test of insanity in the McNaghten Rules was confined to those persons suffering from a "disease of the mind" (Verdun-Jones, 1979b: 22).

If the wording of the new codified section were given its' ordinary meaning, the result would have been to broaden the first test to make the test of the defence more difficult by requiring the defendant to qualify under both tests and to lessen the burden of proof to a limited extent (Canada, 1956: 50).

2: Canada, Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases, McKuer J.C. (Chairman). Ottawa, Ontario: 1956, p. 50

Therefore, the Criminal Code of 1892 provided that all rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge, were to remain in force and be applicable to any defence to a charge under the Code except in so far as they were altered by the Code or inconsistent with it (Canada, 1956: 52).

In the revised Canadian Criminal Codes of 1906 and 1927, the provisions dealing with insanity as a defence were contained in Section (19) and were identical to those in Section (11) of the 1892 Code.

By the 1950's there was a renewed interest in insanity as a defence in criminal cases. This was partly due to the Report of the British Royal Commission on Capital Punishment (1949-53), which contended that the test of criminal responsibility enshrined in the McNaghten Rules was so defective that the law on the subject ought to be changed (Verdun-Jones, 1979b: 25). Section (18) of the report read as follows:

If an alteration were to be made by extending the scope of the rules, we suggest that a formula on the following lines should be accepted: "The jury must be satisfied that

at the time of committing the act the accused, as a result of disease of the mind or mental deficiency (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it".

Although the formula might not prove wholly satisfactory we consider (with one dissentient) that it would be better to amend the rules in this way than to leave them as they are.

In the House of Commons Debates on December 15, 1953, it was recommended by the Honourable Stuart Garson, Minister of Justice, that a joint committee of both houses of parliament be set up to study the criminal law of Canada relating to a) corporal punishment, b) capital punishment, and/or c) lotteries.

Although the British Commission included the defence of insanity in their report on capital punishment, the Canadian government apparently saw it as a separate issue. This can clearly be seen in the statement made by Mr. Garson:

After careful consideration however, we reached the opinion that the defence of insanity to a charge involving criminal responsibility, as laid down by the law and applied by the courts, is a question involving expert legal and psychiatric knowledge in respect of which it seemed to us that it would be at least difficult in the first instance for a committee of laymen to reach a dependable opinion which would inspire

confidence

...To us therefore it seemed preferable that the question of the defence of insanity to a charge involving criminal responsibility should be studied by a Royal Commission made up of recognized experts in the field of law and psychiatry. 3

The following year the Canadian Criminal Code was revised and when Section 16 (insanity defence) was discussed Mr. Diefenbaker made this remark, "This is one of the sections which deserves consideration, and can not be carried quickly. It covers the whole defence of insanity and is one of the most important sections in the Criminal Code". Mr. Garson responded by saying he hoped a Royal Commission would be set up as soon as possible (Canada, 1954: 1254). Mr. Diefenbaker went on to say,

This is a section that will deserve the serious attention not only of the committee of Parliament and the Royal Commission that is set up, but the utmost consideration on the part of penologists and those who are specialists in mental diseases, so as to bring the criminal law up to date. 4

3. Canada, House of Commons Debates, 1953, p. 941.

4. Canada, House of Commons Debates, 1954, p. 1255

In the revised Criminal Code (1953-54) the issue of insanity as a defence was dealt with in Section 16 and read as follows:

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

(2) For the purpose of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him 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 him to believe in the existence of a state of things that if it existed would have justified or excused his act or omission.

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

Section 16 is basically the same as its predecessor Section 19, with a few minor changes. The previous section contained three subsections whereas Section 16 contained four. In the old section, subsection (1) does not refer to the word insane but instead describes what can be construed as insanity; natural imbecility or disease of the mind. However, Section 19 (1) on the other hand states that a

person shall not be convicted of an offence if he was insane at the time of its commission. It is Section 16 (2) where insanity is defined. The new section also saw one as being in a state of natural imbecility or having a disease of the mind and not labouring under the same. The key phrase "incapable of appreciating the nature and quality of an act" was an important change. Section 16 replaced "the act" with "an act" (Parker, 1977: 226). "This was thought to give more flexibility which would lead to a better assessment of the accused's overall mental condition". 5

However, the Canadian law dealing with insane offenders remained the same and it was felt by some that it was time for a change. One such advocate was John Diefenbaker who made his position clear when he said, "The principles of our general law respecting insanity were enunciated 110 years ago and I feel that they are in very considerable measure out of line with modern research". It was hoped by Diefenbaker and others that the Royal Commission on the Law of Insanity as a Defence in Criminal Cases would bring about some changes:

5. Graham Parker, An Introduction to Criminal Law, Toronto, Ontario, Methuen Publications, 1977, p. 226

I realize that the committee in Great Britain that looked into the matter determined after giving full consideration to this question; not to change the rules in McNaghten's case. However there is no reason why the commission here should in any way be bound by what the committee did in the United Kingdom. 6

John Diefenbaker

The Royal Commission was set up to examine insanity as a defence to a charge of criminal liability and to determine whether the law relating to the subject should be amended and if so to what extent (Canada, 1954: 2868). It was chaired by the Honourable J.C. McRuer and gathered information from public meetings and a variety of legal and medical professionals in Canada.

The preponderant weight of the judicial view was that there should be no change in the substantive law as it existed (Canada, 1956: 15). T.F. Forestell, a crown attorney for Welland county, submitted that the law as it stands is reasonably effective if its purpose is to attain justice. He stated that the present Code had worked extremely well and that he did not think a jury has any difficulty when properly instructed (Canada, 1956: 27). The medical opinion also opposed any change in the law except as to terminology (Canada, 1956: 15). Dr. Lucy, representing the Canadian Mental Health Association (Saskatchewan

Division) said, "The fact remains that, as the McNaghten Rule is now administered by the courts, they do seem to be reasonably equitable" (Canada, 1956: 19). Of course there were opposing views, some felt the law should be completely abrogated and the issue decided by psychiatrists alone (Canada, 1956: 20).

The Commission submitted their report October 25, 1956 concluding that the test of criminal responsibility as it existed in Canada should remain the same. It was noted that there were important differences between the McNaghten Rules and the Canadian statutory provisions: in particular the use of the word "appreciate" rather than the word "know" was perceived as a critical distinction which greatly expanded the scope of the insanity defence in Canada (Verdun-Jones, 1979b: 26). To "appreciate" is said to mean not only to "know" but also to estimate a right, perceive the full force of, foresee and measure the consequences of an act or omission (Ryan, 1961: 66). "This alteration was meant to correct the criticism that "know" placed too much emphasis on cognition. "Appreciating" was thought to require a far-reaching legal and medical consideration of the accused's state". 7 The true test necessarily is, was the accused

person at the very time 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 (Weisstub, 1980: 571). The McRuer Report also recommended that subsection 16 (3) be repealed on the basis it was unnecessary in light of subsection (2); they also recommended that Canada should not adopt a defence of irresistible impulse (Verdun-Jones, 1979b: 26).

In accordance with the recommendations of the McRuer Report, the law relating to the defence of insanity in Canada was not changed. Six years later, in October 1962, the issue was brought to the attention of the members of the House of Commons, in the form of a proposed bill. In introducing the bill for the first time F. Andrew Brewin, member from Greenwood said, "The proposed amendment substitutes a rule that a person is insane for this purpose if his act is the product of mental disease or defect. The proposed amendment is in the line with modern concepts of mental illness and criminal responsibility (Canada, 1962: 702). It was intended to replace the old McNaghten Rules with one that was more in keeping with contemporary thought.

Although the bill was read for the first time it was not brought up again until March 1964. Mr. Brewin reiterated the original intent of the bill and added:

The purpose of the bill before the house is designed to amend the inadequate provisions of the Criminal Code in regard to criminal insanity and bring them up to date and in line with enlightened, modern medical opinion. The purpose of the bill is to ensure that where acts are committed by reason of mental illness the person involved is considered a sick person requiring treatment and not as a criminal requiring punishment. 8

In response to Mr. Brewin, L.T. Pennell, member from Brant-Haldermand pointed out that the McLaughlin Rules has stood the test of time. "How is it that the McLaughlin Rules, subjected to the severest criticism, has withstood the onslaught of medical associations, of legal committees and Royal Commissions?" (Canada, 1964: 1619). Another criticism of the bill was levied by John Matheson, member for Leeds when he said, "If the Criminal Code were to be changed in the manner suggested in this bill we could have a situation where a guilty minded person could walk out of court free." Mr. Brewin did receive support for his position from Mr. G.W. Baldwin, member from Peace River when he said, "I want to put forward the proposition that if at

the time the McNaghten Rules were laid down there had been medical people with the knowledge and learning that exists today in the field of psychiatry the McNaghten Rules would not have been laid down as they were then. We would have had rules far more in line with what we should have in this country today". (Canada, 1964: 1622). However, the issue of the defence of insanity was left as it stood and only given slight mention in the House of Commons during the capital punishment debates in the late 1960's.

Although there have been some amendments made in the law with respect to the broad issue of insane offenders such as Section 527 (a), appointment of review boards for those acquitted on the grounds of insanity (Canada, 1968-69: Section 48) and Section 545 (2), remand for observation (Canada, 1974-75-76: Section 68), Section 16 dealing with the test of criminal responsibility has remained the same. No changes have been made except for the very minor ones made in the 1953-54 revision of the Criminal Code of Canada.

Chapter 7

The Canadian Case: Application

In Canada the most celebrated pre-codification application of the McNaghten Rules occurred in 1885 when Louis Riel was tried for treason. His lawyers concluded that due to the incontrovertible evidence, his best chance was to assert insanity as a defence (Verdun-Jones, 1979b: 8). However, Riel vehemently rejected the suggestion believing it would destroy his credibility as the leader of a great religious and political movement. He protested that he was sane at the time of the rebellion (Weisstub, 1980: 575) - and during a lengthy one hour address to the jury he continued to assert his sanity and presented an elaborate justification of his conduct. His plea fell on deaf ears, the jury convicted him of treason but they did recommend clemency. A subsequent appeal to the Manitoba Court of Queen's Bench by Riel was rejected (Verdun-Jones, 1979b: 11).

English speaking Canadians felt Riel should hang. Sir John A. MacDonald and his Conservatives were in power at the time and they also rejected the jury's recommendation for mercy and favoured execution. As MacDonald put it, with

admirable bluntness, "Riel must hang though every dog in Quebec bark in his favour." MacDonald did however appoint a three man medical Commission to investigate Riel's sanity (Verdun-Jones, 1979b: 13). If it was felt that he was insane his execution would be blocked. However, the inquiry came to an end once MacDonald was convinced that Riel knew the difference between right and wrong on the basis of the McNaghten Rules (Weisstub, 1980: 575). Although one of the members of the Commission, Dr. V.X. Valade believed Riel was insane he did concur with fellow Commissioners and Riel was executed November 16, 1885 (Verdun-Jones, 1979b: 13).

A defence of insanity was also set up for Riel's co-conspirator Henry Jackson. Like Riel, Jackson also protested his sanity. Nonetheless he was declared insane in half an hour, acquitted and sent to an asylum from which he promptly escaped. To an English speaking jury, the English speaking Jackson must have been insane to have taken part in Riel's rebellion (Verdun-Jones, 1979b: 11).

Riel's case reinforced the narrow scope of the McNaghten Rules with respect to their emphasis on knowledge of right and wrong. In 1890 the jury in *R v Dubois* was instructed in terms of the McNaghten Rules. The defendant

killed his mother-in-law, was convicted and hanged, (Verdun-Jones, 1979b: 14).

Canadian Courts have often felt more at ease with common law precedents than with a Canadian statute requiring original interpretation. Despite the very significant differences between the MacNaghten Rules and what is now Section 16, of the Criminal Code, Canadian Courts have generally tended to view the Canadian insanity defence as being merely a written version of the English common law. 1

As with the McNaghten Rules, the words found in Section 16 have been subject to much debate and interpretation. This chapter will look at the major components of Section 16, and discuss the relevant cases that have been responsible for setting precedents in Canadian law:

INSANITY - When Insane - Delusions - Presumption of Sanity

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

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of

1. Simon Verdun-Jones, "The Evolution of the Defences of Insanity and Automatism in Canada from 1843 to 1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country" in University of British Columbia Law Review, # 14, 1979-80 p. 70

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 grounds of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed would have justified or excused his act or omission.

(4) Every one shall, until the contrary, is proved, be presumed to be and have been sane. 1953-54, C.51, Section 16.

Natural Imbecility

There has ~~not~~ been a decision in Canada dealing exclusively with the phrase "natural imbecility". It is assumed that it refers to severe deficiency in intelligence (Stuart, 1977: 599). Although it has been virtually ignored Mr. Justice Dubin did discuss the phrase in the 1978 case of R v Cooper (1978) (Nesmith, 1981: 4).

In his dissent he said, "Since the term 'a state of natural imbecility' is included in Section 16 of the Code, it must be given, in my opinion, an independent meaning from the term 'disease of the mind'. I would have thought that the term 'a state of natural imbecility' has reference to the imperfect condition of mental power from congenital defect or natural decay as distinguished from a mind once normal which has become diseased". 2

He felt that the existence of a state of natural imbecility should be based on the evidence relevant to the patient's psychiatric history, his ability to function, his academic and vocational achievement, his skills, emotions and his social maturity (Ortved and Morrison, 1981: 9). Where there is no proof of "natural imbecility" there must be proof of a "disease of the mind" in order for a defence of insanity to be successful under Section 16 (Stuart, 1977: 599). However, since mental deficiency may not in all cases be categorized as a "disease of the mind" the inclusion of the phrase "natural imbecility" in Section 16 is not superfluous (Schiffer, 1978: 127).

Disease of the Mind

"Disease of the mind" is a somewhat difficult term to define, it does however, have two legal components. It relates to the scope of the exemption from criminal responsibility afforded the sufferer and the protection of the public through the control and treatment of the sufferer (Martin, 1981: 19). In *R v Rabey* (1975), Judge Martin emphasized the principle that whether a particular condition constitutes a "disease of the mind" is a question of law and must be decided on a case-to-case basis (Verdun-

Jones, 1979b: 313). Since it is a legal term the task of deciding which illnesses constitute a "disease of the mind" rests on the shoulders of the trial judge (Nesmith, 1981: 4). He must also decide what conditions are not to be considered "diseases of the mind".

In the cases of Kemp (1957) and Charlson (1955), the defendants claimed that they should be acquitted because their particular ailments, arteriosclerosis and cerebral tumor, were caused not by mental disease but by physical disease of the brain. It became necessary for the Canadian courts to clarify the somewhat confusing term (Verdun-Jones, 1979b: 60).

In the celebrated case of *Bratty v the Attorney-General of Northern Ireland* (1961) Lord Denning defined disease of the mind in the following way; "It seems to me that only mental disease which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than given an unqualified acquittal". 3

3. Simon Verdun-Jones, "The Evolution of the Defence of Insanity and Automatism in Canada from 1843-1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country: in U.B.C. Law Review, #14, 1979-80, p. 60.

In Bratty's case psychomotor epilepsy was classified as a "disease of the mind" (Schiffer, 1978: 130).

The most influential Canadian case dealing with this issue was *R v Hartridge* (1966). Judge Culliton relied on the definition provided in the McNaghten Rules which sees a "disease of the mind" as any pathological condition, organic or otherwise which prevents the accused from knowing the nature and quality of his act (Verdun-Jones, 1979b: 60). However, Judge Culliton also pointed out that this definition was not particularly enlightening since pathological means no more than "due to disease" (Verdun-Jones, 1979a: 308). It has been argued that the term "disease of the mind" used by the McNaghten judges could not have referred to anything other than a medical condition (Schiffer, 1978: 127). In *R v Simpson* (1977) Judge Martin pointed out that according to the Supreme Court of Canada and the House of Lords personality disorders and psychopathic personalities are capable of constituting a "disease of the mind" and therefore the term clearly includes mental illness (Verdun-Jones, 1979a: 314).

Although there is no one definition of mental disease generally accepted by the medical profession according to

Whitlock the term "disease of the mind" usually is assumed to refer to one of the major functional or organic psychoses. To most psychiatrists the phrase is seen to be equivalent to the term psychosis (Schiffer, 1978: 128). According to the Encyclopedia of Psychiatry a psychosis is a severe mental illness which produces conspicuously disordered behaviour which cannot be understood as an extension or exaggeration of ordinary experience and whose subject is without insight (Leigh et al, 1977: 303).

It seems clear that the term "disease of the mind" includes a medical component and therefore the testimony of psychiatrists is important. However, their testimony is not determinative that the accused was suffering from a "disease of the mind" (Tweedale, 1981: 7). The role of the psychiatrist should be limited to a description of the illness. The judge then must decide if the psychiatric evidence on the accused's condition amounts to a "disease of the mind" (Nesmith, 1981: 3). While analyzing the insanity defence, Judge Dickson in *Cooper v R* (1979) observed that the phrase "disease of the mind" has proven intractable and has eluded satisfactory definition by both medical and legal disciplines (Dickens, 1981: 37).

In his majority decision, concurred in by four others he said, "In summary one might say that in a legal sense 'disease of the mind' embraces any illness, disease 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". 4.

Appreciate

In their analysis of the Canadian case law between the years 1892 and 1953 the McRuer Commission could not find a decision where the meaning of the word "appreciate" was the central issue. In the Cooper case (1979) Mr. Justice Dickens made it clear that the full meaning of the term encompasses the mental capacity to estimate a right to perceive the full force of, to be sensitive to any delicate impression. He thus reaffirmed the view expressed in the McRuer Report that there must be an appreciation of the factors involved in the act and a mental capacity to measure and foresee the consequences of the conduct (Orchard, 1981: 407). In his judgement in R v O (1959), Judge McRuer reiterated this definition of "appreciate" (Verdun-Jones, 1979a: 304).

4. W.Niels, Ortved and Stephen Morrison, "Representing the Mentally Ill" in the Bar Admission Course: Criminal Procedure 1981-82, p. 10.

According to famed criminal lawyer Clayton Ruby, in Canada, there are two alternatives. You either have to be unable to appreciate that an act is wrong - if you pull the trigger you must be unable to know that it is against the law to kill someone. Or you have to be unable to appreciate the nature and quality of the act - unable to appreciate that when you pull the trigger, the bullet is going to come out and the man will die. Very few people would be considered insane within these categories (TVO, 1982, 212609: 28).

In *Schwartz v R* (1976) it was held by a majority of five judges that the term "appreciate" in Section 16 refers only to the physical character of the act and not the moral aspect (Stuart, 1979: 601). Mr. Justice Martland delivered the judgement of the Supreme Court of Canada and it was argued that he had held "appreciate" to mean more than "know" (Verdun-Jones, 1979b: 28).

It was ultimately accepted that Martland had made a slip of the judicial tongue. In *R v Adamcik* (1977) County court Judge MacKinnon emphasized that "mere knowledge of the nature and quality of the act is not sufficient. There must be, in addition, an ability to appreciate the true significance of the

conduct - a capacity to measure and foresee the consequences of the act." 5

"Appreciate" was further clarified in *Cooper v R* (1980) when it was held to involve an estimation and understanding of the consequences of the act (Nesmith, 1981: 4). This judgement went one step further than the decision in *Adamcik* where the accused was only required to foresee the consequences of his act whereas understanding these consequences tends to require more responsibility on the part of the accused.

Nature and Quality

The term "nature and quality" of the act has been held to refer to the physical aspect of the act in question (Schiffer, 1978: 130). This main authority with respect to the interpretation of this term came in the decision in *R v Codere* (1916). The English Court of Criminal Appeal interpreted the phrase used by the *McNaghten* Judges to refer only to the physical character of the act, and not an attempt to distinguish between the physical and moral aspects of the act (Colvin, 1981: 6).

5. Simon Verdun-Jones, "The Evolution of the Defence of Insanity and Automatism in Canada from 1843-1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country" in U.B.C. Law Review, #14, 1979-80, p. 28

Know

While Section 16 uses "appreciate" with respect to the nature and quality of the act or omission, it uses "know" in reference to the wrongfulness of this act or omission. In the Supreme Court of Canada case of R v Barnier (1980), "know" was held to have a positive connotation requiring a bare awareness, the act of receiving information without more while the act of appreciation, on the other hand was held to require the analysis of knowledge in experience in one manner or another (Orchard, 1981: 408). The problem for judges arises when they have to differentiate between "appreciate" and "know" since there is no factual or even semantic difference between the two terms. In essence "appreciate" is another form of "know" (Arboleda-Florez, 1978: 25). In many American jurisdictions the word "know" in the McNaghten Rules is interpreted much more broadly and their substitution of the word "appreciate" would not affect any sweeping change in everyday practice (Verdun-Jones, 1979a: 304).

Wrong

Since the McNaghten Rules did not give a precise meaning for the word "wrong" both Canadian and English

Courts have had to draw a distinction between a moral and legal wrong (Verdun-Jones, 1979b: 30). In Canada "wrong" was interpreted as contrary to law in the Riel case and forbidden by law in R v Jessamine (1912). With respect to the issue of the moral versus legal wrong Canadian Courts have been split on this issue. The decisions in R v Cracknell (1931), R v Harrop (1940), R v Jeanotte (1932) and R v O (1957) put a moral connotation on the word "wrong". On the other hand the word was held to mean legally wrong in the cases of R v Jessamine (1912), R v Cardinal (1953), R v Mathews (1953) and R v Wolfson (1965) (Schiffer, 1978: 132). The McRuer Report (1967) interpreted the meaning of "wrong" not only to have a legal element but that it refers to something condemned in the eyes of mankind (Verdun-Jones, 1979b: 34).

The issue was further complicated by the judgement in the case of Schwartz v R (1976) where the Supreme Court of Canada held that the word "wrong" meant contrary to law (Mewett, 1975: 403).

In rendering the majority decision Justice Martland stated that, "In my opinion the test provided in Section 16 (2) is not as to whether the accused, by reason of mental disease could or could not

calmly consider whether or not the crime which he committed was morally wrong. He is not to be considered as insane within Section 16 (2) if he knew what he was doing and also knew that he was committing a criminal act". 6

Martland was concerned that interpreting the word "wrong" to mean morally wrong would open the floodgates to a torrent of successful defences.

This majority decision has restricted the meaning of Section 16... "Put the first branch of Section 16(2) - 'nature and quality' into an actus reus concept and the second branch - 'wrong' into a mens rea concept and hence would limit this second branch to cases where the accused did not know he was committing a crime. But it is not the knowledge of the accused that has to be proved, but his capabilities". 7

Shortly after the Schwartz case in R v Meadus, Justice Wright of the Ontario Supreme Court concluded that the case was not strictly binding on anyone (Verdun-Jones, 1979a: 300). In his instructions to the jury his Lordship said

6. Simon Verdun-Jones, "The Insanity Defence since Schwartz v R" in Criminal Reports (3rd) 6, 1979, p. 300.

7. A. Mewett, "Section 16 and Wrong" in Criminal Law Quarterly 1975-76, Vol. 18, p. 117

that "wrong" can mean contrary to the law or it can mean "wrong" in the moral sense, that is "wrong" in that it is contrary to the view of reasonable men in society as to good or evil. If either one of these conditions exists the defendant is entitled to an acquittal by reason of insanity (Schiffer, 1978: 135). In a 1977 decision the Ontario Court of Appeal in R v Simpson accepted the authority of Schwartz (Verdun-Jones, 1979a: 300).

Logically, neither definition of "wrong" (moral or legal) can give broader scope to the insanity defence. A person may know his act is wrong but due to a disease of the mind he may erroneously believe that it is not contrary to law. In order for an insanity defence to succeed only those who comprehend the significance of their actions will be subject to the stigmatizing and penal features of the law (Colvin, 1981: 18).

Delusions

According to the DSM-III, a delusion is a false belief about external reality which is firmly substantiated in spite of what others believe and/or proof of evidence to the contrary (American Psychiatric Association, 1980: 356). Delusions can manifest themselves in a variety of ways from

bizarre and grandiose in nature to delusions of reference. The presentation of evidence showing that the accused suffers from delusions is not, in itself proof of criminal insanity. A person acting under a delusion is judged by the same standard as a sane person (Schiffer, 1978: 137).

Other Aspects of the Insanity Defence

Section 16 (4) provides that every one shall be presumed to be sane until the contrary is proven. This presumption of sanity was also found in the 1892 codification, however it was left up to the Canadian Court to determine the degree of proof necessary in order to successfully plead insanity (Verdun-Jones, 1979b: 46). As a result of this presumption the onus is on the accused to show that he falls within the boundaries of what is considered insane (Nesmith, 1981: 6).

In the case of R v Kierstead (1914) the Supreme Court of New Brunswick held that the defence of insanity must be established beyond a reasonable doubt (Verdun-Jones, 1979b: 46). The Supreme Court of Canada in Clark v R (1921) decided that it was sufficient if insanity was proven to the reasonable satisfaction of the jury (Nesmith, 1981: 6). Canadian Courts have stated that it is not necessary to

prove insanity beyond a reasonable doubt but merely on a balance of probabilities (Verdun-Jones, 1979b: 67).

As previously mentioned, the onus is on the accused to show that he is insane within Section 16 (2), however there are exceptions. Canadian Courts have departed from the approach taken by their British counterparts in their willingness to allow the Crown to raise the issue of insanity even when the defence objects (Verdun-Jones, 1979b: 45) and even though the offence charged is comparatively minor in nature (Griffiths et al, 1980). The general rule followed in England is that the prosecution should not be permitted to lead evidence of insanity unless the defendant puts his own state of mind in issue (Verdun-Jones, 1979b: 45). In Canada the issue of sanity at the time of the offence may be raised by the Judge, Crown or defendant. If both the prosecution and defence are in agreement that the accused was insane when the alleged offence was committed, psychiatric evidence is then called by the Crown to show the accused was insane at that time (Tweedale, 1981: 6). As is the case with the accused, when the Crown raises evidence of insanity they must also prove their case on a balance of probabilities (Ortved and Morrison, 1981: 15).

In the case of R v Frank (1971) Judge Moorhouse ruled that the prosecution could argue for insanity (Salutin, 1975: 242) even over the objection of the defence and when the defendant himself has not put the state of his mind in issue. In R v Talbot (1977) the trial judge summoned witnesses to testify as to the accused's state of mind at the time of the alleged offence.

The ability of the Crown to raise insanity as a defence does have some disturbing implications especially since the outcome of a successful insanity defence will be the indefinite detention of the accused at a psychiatric facility (Verdun-Jones, 1979b: 45). In some cases the interests of the accused may be prejudiced and his chance of obtaining an unqualified acquittal undermined (Martin, 1981: 22) thus depriving him of his right to a fair trial (Verdun-Jones, 1979b: 46). These concerns and others were voiced by Judge Martin in R v Simpson (1977) when he said,

"The prosecution, clearly ought not to be entitled to bolster a weak case with evidence that the accused was insane, where the admission of such evidence might deprive the accused of a fair trial on the issue whether he committed

the act by leading the jury to conclude that he is the sort of person likely to have committed the act charged". 8

Recent Canadian case law suggests that the trial judge has the power to reject a plea of insanity raised by the Crown (Verdun-Jones, 1979b: 47). Ultimately, it is still up to him, when sitting alone, or the jury, to decide if the accused was insane at the time the alleged offence was committed (Tweedale, 1981: 6).

It is important that juries be properly instructed with respect to the insanity defence. They should be made aware that there is a difference between an accused who does not intend to bring about a particular result and one whose mind is so disturbed that he will not be held criminally liable for his actions (Reynolds, 1979: 208).

Ordinarily jurors are not told the consequences of their verdict, however, since they may be reluctant to acquit a person pleading insanity, believing he may go free, they should be made aware of the consequences of a not guilty by reason of insanity verdict. (Ortved and

8. W. Niels, Ortved and Stephen Morrison, "Representing the Mentally Ill" in the Bar Admission Course: Criminal Procedure 1981-82, p. 14

Morrison, 1981: 17). Justice Lieberman reaffirmed this view in the case of *R v Conkie* (1978) when he said,

"In my view; when insanity is raised as a defence, the trial judge in the exercise of his duty to ensure a fair trial would be well advised to inform the jury of the consequences of a verdict of not guilty by reason of insanity. This is particularly true where the nature of the offence and the character of the accused would tend to indicate that the accused is a dangerous individual in cases where counsel have not in their addresses to the jury informed it of these consequences. For that reason I have already expressed, I am of the opinion that the practice does not offend the general rule that the jury should not be informed of the consequences of its verdict". 9

If a defendant is found to be not guilty by reason of insanity the court shall order him held in custody at a psychiatric hospital until he has recovered sufficiently to be released back into society. This occurs only when the accused has committed an indictable offence, there is no counterpart in the Criminal Code for summary conviction offences and an accused found to be insane at the time of their commission is acquitted and goes free (Tweedale, 1981: 5). The Criminal Code leaves no alternatives between

9. Simon Verdun-Jones, "The Insanity Defence since *Schwartz v R*" in Criminal Reports (3rd) 6, 1979 p. 300.

a verdict of not guilty by reason of insanity and indeterminate detention and an unqualified acquittal (Beck, 1966: 319). Anything short of insanity can not be considered as evidence of the accused's pathological mental make-up since diminished responsibility is not recognized as a defence by Canadian Courts (Reynolds, 1979: 203). They also do not consider irresistible impulse as a form of insanity per se, although the term has been referred to with respect to the motivation of the accused (Schiffer, 1978: 140). In the final analysis it appears that Section 16, the legal test for insanity in Canada, remains a cognitive differentiation between good and evil (Arboleda-Florez, 1978: 25).

Chapter 8

The Canadian Case: Statistics

This chapter will discuss a number of selected statistics dealing with the insanity defence. It consists of four tables, Tables 1 to 3 present a general overview of the statistics collected by Statistics Canada during the years 1961 to 1973 (inclusive).

Table 1 shows the number of persons charged with indictable offences during the selected years and the number of accused who were detained for insanity.

Table 1

Persons charged with Indictable Offences

<u>Year</u>	<u>Number Charged</u>	<u>Detained for Insanity</u>	<u>%</u>
1961	43,161	94	0.22
1962	38,663	57	0.15
1963	42,914	80	0.19
1964	42,097	117	0.28
1965	41,832	109	0.26
1966	*		
1967	45,703	72	0.16
1968	49,963	57	0.11
1969	38,017	43	0.11
1970	75,334	84	0.11
1971	79,437	81	0.10
1972	77,650	57	0.07
1973	72,430	93	0.12

Data taken from Statistics Canada, Statistics of Criminal and Other Offences (Cat. 85-201) 1961-1968, 1970-1972 and 1973.

* Data unavailable for 1966.

From Table 1 it can be seen that less than 1% of those charged with indictable offences in Canada were detained for insanity. More information can be obtained from Table 2 which looks at those detained by category of the offence and Table 3 which breaks down the number detained for insanity by specific offence.

The use of insanity as a defence has been relatively restrained in Canada. Between the years 1961 and 1974, of the 3,061 adults charged and tried for murder, an annual average of 16.5 were acquitted on the basis of insanity (Verdun-Jones, 1979b: 71).

It is believed by many that the insanity defence was introduced and expanded to provide an escape hatch for individuals committing capital offences, who would otherwise be executed (TVO, 1982, 212609). Although capital punishment was abolished in Canada in 1976 no one has been executed since 1962 (Canada, 1981: 121). The majority of insanity acquittals appear to result from charges not related to homicide. In 1973 only twenty-three of the ninety-three charges that resulted in a not guilty by reason of insanity plea involved homicide (Verdun-Jones, 1979b: 72).

Table 2

Persons Detained for Insanity by Offence Category

<u>Offence Category</u>	<u>Those Detained for Insanity</u>												
	1961	1962	1963	1964	1965	1967	1968	1969	1970	1971	1972	1973	
Violence Against the Person	42	25	37	41	38	45	32	31	56	34	29	45	
Against Property with Violence	8	10	5	27	21	13	8	4	4	8	11	11	
Against Property without Violence	40	12	17	31	32	8	7	6	8	15	8	15	
Malicious Offences Against Property	5	10	16	9	5	4	4	4	4	3	9		
Forgery and Offences Relating to Currency	1	1	4										
Other	4	5	10	11	5	1	6	2	12	7	6	13	

* Data taken from Statistics Canada, Statistics of Criminal and Other Offences, (Cat. 85-201) 1961-1968, 1970-1972 and 1973

Table 2 shows that a large number of accused have been detained for insanity for committing non-violent property crimes, forgery and other less serious offences. In fact, between the years 1961 and 1973, one hundred and ninety-nine (199) individuals were detained for committing non-violent property offences. Since no one has been executed for forgery, it appears that the original purpose of the insanity defence has become somewhat diluted. Further evidence can be seen in Table 3 which shows that defendants have been detained for offences such as leaving the scene of an accident, common assault, seduction and public mischief.

The consequence of a finding of not guilty by reason of insanity is severe, the result being indeterminate detention in a psychiatric facility until the pleasure of the Lieutenant-Governor of the province is known. A conviction for public mischief under Section 128 (e) of the Canadian Criminal Code (as an indictable offence) carries a maximum penalty of five years, whereas a conviction for murder carries a sentence of life imprisonment. In essence, a person committing murder and one found guilty of public mischief could be subject to the same penalty, if the defendants set up insanity as a defence.

In addition, everyone found not guilty by reason of insanity is, for the rest of his life subject to the prerogative of a Lieutenant-Governors Warrant, which enables him to be re-arrested and taken up without any reason, cause or resource (TVO, 1982, 212609: 47). On the other hand an individual found guilty in the traditional sense is free after he has completed his sentence or successfully met the conditions of a parole order.

It appears that the insanity defence is more of a penalty than the safety hatch it was designed to be. The individual is being penalized and punished not for the offence he has committed, but for being mentally ill.

Although the information contained in Table 3 is useful, it is somewhat general and only looks at a twelve year period. This is due in part to the fact that publication of Catalogue 85-101, from which the data comes, was discontinued with the 1973 issue. Table 4 provides a different view of the defence of insanity in Canada as it looks at specific cases and judgements which have been rendered with respect to this issue. It outlines many of the cases touched on in Chapter 7 giving details on the charge and subsequent results of the trial and/or in most

Table 3

Charges Resulting in Detention for Insanity by Nature of Indictable Offence in Canada

Offence	1961	1962	1963	1964	1965	1967	1968	1969	1970	1971	1972	1973
Assault Causing Bodily Harm	4	3	5	5	3	5	1	7	2	1	6	
Assault on a Peace Officer and Obstructing	1		1	2	3	1	1	1			1	
Abduction and Kidnapping	1								1			
Buggery, Bestiality, Gross Indecency	4	1			3	3						
Causing Bodily Harm and Danger	1	1	6	4	8	5	6	5	2	2	7	
Criminal Negligence										1		
Criminal Negligence - Bodily Harm (motor vehicle)		1		1	1							

Table 3 con't

131

Offence	1961	1962	1963	1964	1965	1967	1968	1969	1970	1971	1972	1973
Other Criminal Negligence - Bodily Harm							1	2				
Other Criminal Negligence - Death							1				2	
Common Assault	2			4				3		1		
Incest	1	2		1		1						
Indecent Assault on a Female	8	4	6	12	4	1	10		1	3	1	1
Indecent Assault on a Male				1	3			1	1	3		
Sexual Inter- course and Attempt	1			2	1							
Offences Tend- ing to Corrupt Moral					1							
Seduction		1										
Procuring					1						1	

Table 3 con't

Offence	1961	1962	1963	1964	1965	1967	1968	1969	1970	1971	1972	1973
Infanticide	1											
Attempted Murder	3	3	5	2	4	8	2	8	4	3	8	
Capital Murder	1	4	13	8	6	3	2					1
Non-Capital Murder	19	4	1	3	12	12	20	21	15	18	14	14
Manslaughter					1			1				
Rape			1		1			7	2			2
Attempt Rape	1								4			
Counselling and Aiding, Suicide			1									
Break and Enter	6	7	4	26	21	11	5	1	2	4	8	6
Robbery	1	2				2	2	2	4	2	4	4
Armed Robbery		1	1	1			1	2		1	1	1
False Pretence	24	3			1		5	2	14	1	5	
Fraud and Corruption		1		1	17							

Table 3 con't

133

Offence	1961	1962	1963	1964	1965	1967	1968	1969	1970	1971	1972	1973
Forgery and Uttering				1	1	4						
Threatening Letters						1						2
Extortion	1						1					
Having in Possession	4	3	3	2	1	3	2	4	1			1
Theft	12	5	14	18	13	8	4	1	4	1	3	9
Arson & Fire		4	5	14	5	2	3		3	6	3	9
Attempt to Commit and Accessories				1					1			
Conspiracy				2	1							
Public Mischief				1	1							
Other Interferences with Property		1	5		4	3	1		1		11	
Offensive Weapons	3	3	8	5	3	1	3	2	10	7	5	13

Table 3 con't

134

Offence	1961	1962	1963	1964	1965	1967	1968	1969	1970	1971	1972	1973
Prison Breach Escape and Rescue	1	2	1				2		1			
Dangerous Driving						1	1			1	1	1
Driving While Intoxicated							1					
Failing to Stop at the Scene of an Accident											1	
Other Offences Against the Person												
Various Other Offences												

* Data for Table III taken from Statistics Canada, Statistics of Criminal and other Offences (Cat 85-201) 1961-69 Table 13, 1970-73 Table 11

cases an appeal. The list of cases is not exhaustive by any means but it does provide a good overview of Canadian jurisprudence with respect to mentally ill offenders over the last one hundred years.

In Canada, the legal definition of murder has been changed a number of times in the last two decades. In 1961 murder was classed as capital and non-capital, with capital resulting in the death penalty and non-capital in life imprisonment (Canada, 1981: 117). In 1976 Bill C-84 abolished capital punishment from a Canadian Criminal Code and murder was classified as first and second degree. Of the fifty-nine cases outlined in Table 4 36 or 61% involved murder. Between 1978 and 1982 there were four cases involving first degree murder that were appealed by the defendant (Theriault, 1978, 1981; Kjeldsen, 1980, 1981; Hall, 1981 and Fitzgerald, 1982). Indeterminate detention may be less lengthy, and therefore more attractive an alternative than the required minimum twenty-five year sentence for first degree murder. Between 1961 and 1974 of the 2,711 males originally charged with murder and sent to trial one hundred and seventy-eight (178) or 7.5% were acquitted on the basis of insanity. On the other hand, three hundred and fifty (350) women were charged and sent to trial for the

same offence during the same period and fifty-three (53) or 15.1% were acquitted on the same basis (Verdun-Jones, 1979b: 73). Table 4 does not distinguish between the sexes so it is difficult to hazard a guess as to why the percentage of women acquitted on the basis of insanity was double that of their male counterparts. However in one 1977 case (R v Irwin) the defendant was charged with murder and found not guilty by reason of insanity. The diagnosis was post-partum depression thus the type of crime may provide a clue to the difference in the crimes committed, the reason for these crimes and the effect these reasons may have on the jury.

In 1976 twelve adults were acquitted by reason of insanity. This group of nine men and three women represent 4.4% of the original two hundred and seventy people sent to trial for homicide. In 1977 only one person was acquitted by reason of insanity out of a total of one hundred and eighty-seven suspects tried for homicide (Verdun-Jones, 1979b: 71). The cases in Table 4 are for the most part appeal cases and thus the original offence charged may have occurred several years before it reached the Court of Appeal.

Since murder is a serious charge and carries a severe penalty it is reasonable that many cases in Table 4 involved

murder. However there are still a number of cases where other less serious offences have been committed. For example, in *R v Curran* (1974) the charge was theft under \$200., in *R v Haymour* (1974) and *R v Saxell* (1980) the defendants were charged with possession of dangerous weapons and *R v Scroggie* (1979) the charge was writing threatening letters,

Since a significant percentage of insanity acquittals involve charges which are unrelated to homicide and since Canadian jurisprudence permits the Crown to raise the issue of insanity in the teeth of strenuous objections by the defence, it might well be argued that less concern should be spent over the precise wording of the insanity defence and much more attention should be directed at devising a satisfactory policy in relation to the ultimate disposition of those persons acquitted by reason of insanity. 1

1... Simon Verdun-Jones, "The Evolution of the Defence of Insanity and Automatism in Canada from 1843-1979: A Saga of Judicial Reluctance to Sever the Umbilical Cord to the Mother Country" in U.B.C. Law Review, #14, 1979-80, p. 73

Table 4

Canadian Cases Dealing With Insanity

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Jackson	1885	Treason co-conspirator with L. Riel	defence - insanity acquitted - not guilty by reason of insanity	Verdun-Jones 1979b: 11
R v Dubois	1890	Murder	defence - insanity found guilty & hung	Verdun-Jones 1979b: 14
R v Jessamine	1912	Murder	defence - insanity irresistible impulse found guilty	19 C.C.C. 214
R v McGill	1929	Murder	defence - insanity appealed - new trial ordered	51 C.C.C. 379
R v Jeanotte	1932	Murder	defence - insanity appealed - new trial ordered	1932 W.W.R. 2: 283

Table 4 con't

139

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Cardinal	1953	Murder	defence - insanity convicted appealed by accused new trial ordered	1953 W.W.R. 10: 403
R v Charlson	1955	Assault causing bodily harm	defence - cerebral tumor acquitted - not guilty by reason of insanity	Verdun-Jones 1979b: 58
R v Kemp	1957	Assault causing bodily harm	defence - insanity arteriosclerosis acquitted	Verdun-Jones 1979b: 58
R v Borg	1969	Capital Murder	defence - insanity found guilty	Blom, 1969 274
R v K	1970	Manslaughter	defence - insanity insane-automatism acquitted - not guilty	3 C.C.C. 2d 84

Table 4 con't

140

CASES	YEAR	CHARGE	OUTCOME	SOURCE
R v Parnekar	1971	Non-Capital Murder	defence - insanity temporarily insane insane automatism appeal - new trial ordered	5 C.C.C. 2d 11
R v Potvin	1971	Attempted Murder	defence - temporary defendant acquitted Crown - appealed appeal allowed new trial ordered	16 C.R.N.S. 233
R v Fisher	1973	Non-Capital Murder	defence - insanity not established Appealed-dismissed	12 C.C.C 2d 513
R v Lafrance	1972	Non-Capital Murder	defence - insanity found guilty Appealed-for a not guilty by reason of insanity verdict dismissed	8 C.C.C 2d 23
R v Gillis	1973	Mischief, Possession of a Dangerous Weapon	defence - insanity verdict-not guilty by reason of insanity	13 C.C.C. 2d 362

Table 4 con't

141

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Leech	1973	Kidnapping, Theft of a Motor Vehicle while armed, buggery, theft of a pistol	defence - insanity verdict - guilty	10 C.C.C. 2d 149
R v Santinon	1973	Non-Capital Murder	Verdict - Not guilty by reason of insanity Appeal-allowed new trial ordered	Weisstub 1980: 588
R v Craig	1974	Rape, Assault causing bodily harm	defence - insanity Verdict - guilty	22 C.C.C. 2d 212
R v Curran	1974	Theft under \$200.	Verdict - Not guilty by reason of insanity Accused appeal Allowed new trial ordered	21 C.C.C. 2d 23
R v Haymour	1974	Possession of weapon dangerous to public peace	Accused plead guilty Crown-rejected plea raised insanity Verdict-Not guilty by reason of insanity	21 C.C.C. 2d 30

Table 4 con't

142

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Mulligan	1974	Non-Capital Murder	defence - insanity provocation and intoxication Accused Appeal-dismissed	5 C.R.N.S. 179
R v Scroggie	1974	Threatening letters and calls	Accused plead guilty Crown Appeal raise insanity Appeal allowed	15 C.C.C. 2d 309
R v Baltzer	1975	Murder	defence - insanity Appeal-allowed new trial ordered	27 C.C.C. 2d 118
Chartrand v R	1975	Capital Murder	defence - diminished responsibility Rejected	Weisstub 1980: 590
R v Hubbert	1975	Murder	Judge left insanity to jury as a poss- ible defence Accused appealed dismissed	29 C.C.C. 2d 279

Table 4 con't

143

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Johnson	1975	Robbery	defence - automatism, epilepsy Accused appealed new trial ordered	29 C.C.C. 2d 305
R v Meloche	1975	Murder	defence - insanity Accused appealed allowed new trial ordered	34 C.C.C. 2d 184
R v Sproule	1975	Non-Capital Murder	defence-automatism Appeal allowed new trial ordered	29 C.C.C. 2d 92
R v Stanford	1975	Hijacking an aircraft, carrying a weapon on board	defence - insanity Accused appealed dismissed	27 C.C.C. 2d 521
R v Browning	1976	Murder	defence-dissociative state short of insanity Accused appealed dismissed	34 C.C.C. 2d 200

Table 4 con't

144

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Gorecki	1976	Non-Capital Murder	defence-accident court concluded defendant suffered from severe mental disorder new trial ordered on an insanity defence	32 C.C..C. 2d 135
R v Lappin	1976	Attempted Murder	Crown-insanity Accused appealed verdict of not guilty by reason of insanity Appeal-dismissed	40 C.R.N.S. 77
R v Adanick	1977	Robbery	Defence-insanity accused saw him self as Robin- Hood like, received his instruction from God, used a toy gun Verdict-not guilty by reason of insanity	33 C.C.C. 2d 11

Table 4 con't

145

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Barnier	1977	Non-Capital Murder	defence-insanity Accused-appealed allowed- Verdict not guilty by the reason of insanity	37 C.C.C. 2d 508
	1980		Appealed by Crown dismissed	51 C.C.C.2d 193
R v Budic	1977	Murder	defence - insanity Accused - appealed new trial ordered pursuant to Section 543(5) of the Crim- inal Code	35 C.C.C. 2d 273
R v Hilton	1977	Non-Capital Murder	defence - insanity verdict - guilty Appealed by accused conviction quashed appeal allowed new trial ordered	34 C.C.C. 2d 206

Table 4 con't.

146

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Irwin	1977	Murder	defence - insanity post partum depression, personality disorder Verdict not guilty by reason of insanity	C.C.C. Index A 211
R v Lechasseur	1977	Murder	defence - insanity Accused - appealed allowed new trial ordered	38 C.C.C. 2d 319
R v Rabey	1977	Causing bodily harm with intent to harm	defence-automatism psychological blow not insane under Section 16 Appealed by Crown should have been not guilty by reason of insanity Appeal allowed new trial ordered	37 C.C.C. 2d 462
Rabey v R	1980		Accused appealed from a judgement of the Ontario Court of Appeal allowing an appeal by the Crown Appeal-dismissed	54 C.C.C. 2d 1

Table 4 con't

147

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Simpson	1977	Attempted Murder X 2	Crown - insanity Verdict-not guilty by reason of in- sanity Appealed by accused allowed new trial ordered	35 C.C.C. 2d 339
R v Sweeney	1977	Murder	defence - insanity Appeal by accused dismissed	35 C.C.C. 2d 245
R v Talbot	1977	First Degree Murder	Crown - insanity Appeal-allowed new trial for second degree murder	38 C.C.C. 2d 560
R v Conkie	1978	Murder	defence - insanity Appeal - by accused allowed new trial ordered	39 C.C.C. 2d 409
R v Cooper	1978	Murder	defence - insanity Appeal - by accused dismissed	40 C.C.C. 2d 145

Table 4 con't

148

CASE	YEAR	CHARGE	OUTCOME	SOURCE
Cooper v R	1980		Appeal-by accused from a judgement of Ontario Court of Appeal from a conviction of murder Appeal-allowed new trial ordered	51 C.C.C. 2d 129
R v Theriault	1978	First Degree Murder	defence - insanity Verdict - guilty Appeal-by accused dismissed	45 C.C.C. 2d 46
Theriault v R	1981		Appeal - by accused dismissed	61 C.C.C. 2d 102
Schwartz v R	1979	Murder X 2	defence - insanity Appeal-by accused dismissed	25 C.C.C. 2d 477
R v Wright	1979	Murder	defence - insanity Appeal-new trial ordered	48 C.C.C. 335

Table 4 con't

149

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Kjeldsen	1980	First Degree Murder	defence - insanity Appeal-by accused dismissed Verdict Second Degree Murder	53 C.C.C. 2d 55
Kjeldsen v R	1981		Appeal - by accused from a judgement of the Alberta Court of Appeal dismissing his appeal from a conviction of first degree murder and substituting second degree murder-wants insanity considered as a defence Appeal dismissed	64 C.C.C. 2d 161
R v MacLeod	1980	Rape, carnal knowledge, causing bodily harm	defence-dissociative state Appeal-by Crown Judge should have instructed jury to consider defence of insane automatism and not non-insane automatism Appeal-allowed new trial ordered	52 C.C.C. 2d 193

Table 4 con't

150

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Rafuse	1980	Murder	defence - insanity Verdict - guilty Appeal - by accused allowed new trial ordered	53 C.C.C. 2d 161
R v Saxell	1980	possession of a weapon dangerous to the public peace	Crown-insanity Verdict-not guilty by reason of insanity	59 C.C.C. 2d 177
R v Abbey	1981	importing and possession of narcotics for the purpose of trafficking	defence - insanity Verdict-not guilty by reason of insan- ity Appeal-by Crown dismissed	60 C.C.C. 2d 50
R v Abbey	1982		Appeal-by Crown from a judgement of British Col- umbia dismissing its appeal from a finding of not guilty by reason of insanity Appeal- allowed new trial ordered	68 C.C.C. 2d 394

Table 4 cont

151

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Dickie	1981	Attempted Murder	Crown - insanity Verdict-Crown not allowed to raise issue of insanity Accused acquitted	63 C.C.C. 2d 151
R v Dickie	1982	Attempted Murder	Appeal-by Crown from accused's acquittal on a charge of attempted murder Crown-insanity defence Appeal allowed new trial ordered	67 C.C.C. 2d 218
R v Fiddler	1981	Murder	defence - self-defence, provocation, non-insane automatism Appeal-by accused dismissed	58 C.C.C. 2d 517
R v Rolls	1981	First Degree Murder	defence - hysteria dissociative state Appeal-by accused allowed new trial ordered	62 C.C.C. 2d 512

Table 4 con't

152

CASE	YEAR	CHARGE	OUTCOME	SOURCE
R v Fitzgerald and Schoenberger	1982	First Degree Murder	defence - insanity Appeal-by accused (F) from his con- viction of first degree murder Appeal by Crown from the acquittal of accused (S) on same charge	70 C.C.C. 2d 87
R v Grady	1984	Murder	Crown - insanity manic depressive psychosis Verdict not guilty by rea- son of insanity	Ottawa Citizen 3-1984
R v Ginese	1984	Attempted Murder	defence - insanity Verdict-not guilty by reason of insanity	Ottawa Citizen 3-1984

Chapter 9

Alternatives and Future Considerations

...McNaghten's acquittal was a precursor to that debauchment of language which, as Orwell taught us is characteristic of modern bureaucratic societies. De jure McNaghten was acquitted; de facto he was sentenced to life imprisonment in an insane asylum. 1

This may also be the case in Canada. The consequences of a not guilty by reason of insanity verdict may be an acquittal but the individual does not walk out of the courtroom a free man. In many cases such a finding may be worse than a guilty verdict. In the 1960's the first person found not guilty by reason of insanity was finally released from Penetanguishene after spending forty years of his life there (Weisstub, 1972: 95). The mentally ill defendant is often detained because their disorder is routinely equated with dangerousness by psychiatrists, the courts and society. According to Steadman the mentally ill are the only group who can be preventively detained for violence they might perpetrate rather than the violence they have performed (Brooks, 1975: 43).

1. Curt T. Griffiths, John F. Klein and Simon Verdun-Jones, Criminal Justice in Canada, Toronto, Ontario: Butterworth & Company, 1980 p. 358.

The committal to a psychiatric hospital is automatic and somewhat inadequate in that it can not determine the extent of the mental illness or treat it. The promise of treatment in a psychiatric institution as opposed to punishment in a penal institution may be a hollow one if our adversary system is unable to select those entitled to the treatment or properly treat those selected (Chernoff and Schaffer, 1971: 814).

In R v Barnier (1980) the Chief Justice of British Columbia called for far reaching reform in the legal approach to the insanity defence.

...In my view, the real question is, should the accused be confined in a mental institution and this will depend on how dangerous he is, irrespective of legal guilt. The test should be whether the accused is suffering from a disease or disorder of the mind to such an extent that he is a menace to society. 2

It has been suggested by a number of contemporary reformers that the issue of mental disability be separated from the trial process. Both Lady Barbara Wooton and

2. David Weisstub, Law and Psychiatry in the Canadian Context, Toronto, Ontario: Pergamon Press, 1980 p. 656

Professor H. Hart argue that the issue of insanity should be decided by a post-trial assessment. The bifurcated trial system is based on Hart's view that a criminal case should be separated into two parts (Louisell and Hazard, 1961). The issues of guilt and insanity are determined by a jury in separate proceedings (Shadoan, 1972). The system is based on the view that insanity excuses the defendant's conduct but that conduct was still criminal (Louisell and Hazard, 1961).

During the first stage the jury considers the guilt of the defendant with respect to each element of the charge (Kaufman, 1982). If the defendant is found guilty then the same jury, or perhaps a new one will decide on the issue of insanity (Louisell and Hazard, 1961). Under this system the defendant is found guilty before the insanity defence can be invoked. Elements of the defendant's mental health are admissible to prove or disprove the elements of the charged offence (Goldstein and Katz, 1963: 865).

California, Connecticut, Georgia, New York, Pennsylvania and Texas provide for the two stage procedure (Shadoan, 1972). In California the system was designed to simplify issues for trial and to diminish unwarranted

appeals to jury sympathies. In 1927 a system similar to California's was adopted in Colorado. The defendant's right to demand the separate trial on the insanity issue was repealed by the Colorado legislature in 1957. The procedure was later abandoned in Louisiana and Colorado based on the advances made in psychiatry over the last twenty-five years. In 1937 the Texas legislature provided that the jury trying the issue of the defendant's present sanity may also render a verdict on his sanity at the time of the offence. Two successive juries can pass on the defendant's sanity and if either one finds that he was insane at the time the crime was committed then he is not guilty (Louisell and Hazard, 1961).

This system does, however, have drawbacks in that all evidence regarding the defendant's mental condition at the time of the commission of the offence is admissible as evidence during the guilt determination phase (Shadoan, 1972), thus resulting in duplication. More importantly the bifurcated trial is based on an inaccurate premise of law; that the issue of guilt and the issue of mental condition are separable (Louisell and Hazard, 1961).

The Canadian Law Reform Commission in their 1976 Report

recommended that an acquittal on the basis of insanity be treated as a true acquittal which would be subject to a post acquittal hearing. It would be at this hearing that the issue of detention would be decided on the basis of his psychiatric dangerousness (Weston and Turner, 1981: 3). A second and more fair alternative would be to treat an acquittal on the basis of insanity as a criminal disposition subject to the same controls and reviews as other court sentences (Stevens and Roesch, 1980: 13).

An insanity defence without limits is an attractive prospect particularly if the consequence is treatment. However, this is something that is not likely to occur in Canada in the near future. A more radical proposal is total abolition of the insanity defence. Before this option is discussed this chapter will look at some alternatives that have been proposed and/or implemented in other jurisdictions.

Diminished Responsibility

In 1957 the English Homicide Act introduced the concept of diminished responsibility. Under this concept the punishment can be mitigated in murder cases where there is evidence that the defendant accused is mentally abnormal in

some sense but not insane. Even though the act was premeditated and the accused knew what he was doing and knew it was wrong the accused may still rely on a plea of diminished responsibility (Weisstub, 1980: 632). It is clearly a matter of facts in each case that determines what diminished responsibility is and if the particular defendant qualifies. Witnesses and psychiatrists are utilized to determine this information so that the appropriate conclusions can be drawn in each case (Weisstub, 1980: 634). Although it is not a defence as such, it does mitigate the punishment for those who do not fall within the McNaghten formulation but do lack the requisite mens rea (Weisstub, 1980: 620).

The McRuer Report (1956) considered introducing a doctrine of diminished responsibility in Canadian Law but the idea was abandoned (Verdun-Jonès, 1979b: 42). However, it has been adopted in several American states including California (Weisstub, 1980: 620). The American Law Institute's Model Penal Code adopted diminished responsibility as an evidentiary rule allowing the admissibility of evidence pertaining to the defendant's mental state if it is relevant to prove that he lacked the state of mind which is an element of the offence (Weisstub,

1980: 633).

In a 1970 Report to the Governor of New York, it was recommended that insanity should not be an absolute defence to a criminal charge and that a rule of diminished capacity be adopted. The rule would allow the admissibility of evidence regarding abnormal mental conditions for which an accused could be convicted. The underlying assumption being that the correctional system is the appropriate place to treat the mentally ill offender (Verdun-Jones, 1979a). Canadian courts have also recognized that there may be many mental disorders which fall short of what is required to assert a successful insanity defence according to Section 16. However, their existence may still negate the defendant's capacity to form the specific intent required for such offences as robbery, theft and murder (Verdun-Jones, 1979b). Thus, in doing so Canadian courts have recognized a limited doctrine of diminished capacity, one that exists alongside rather than in place of the insanity defence (Verdun-Jones, 1979a). The reluctance to recognize diminished responsibility as a defence may be founded in the fear that the courts would be inundated with a number of such pleas (Weisstub, 1980: 634). However, in England the effect has been the opposite. Rather than existing with the

insanity defence the Homicide Act has replaced the McNaghten Rules with a finding of diminished responsibility (Jacobs, 1971). This approach has been welcomed by juries as a preferable alternative to the traditional defence of insanity. If the insanity defence must be jettisoned in favour of a doctrine of diminished responsibility all we would lose would be some 135 years of confused criminal jurisprudence (Verdun-Jones, 1979b: 73).

Partial Responsibility

In addition to the doctrine of diminished responsibility is the defence of partial responsibility. The underlying assumption is that if the defendant is incapable of achieving the mental state required for a specific degree of crime then he is not responsible for that particular crime. Indeed he may be capable of distinguishing between right and wrong but is unable to premeditate the crime due to his particular mental condition. If this condition is shown to exist he would then be convicted and punished for a lesser crime. For example, he may be suffering from a mental condition that would prevent him from premeditating a murder, so the charge would be reduced from first degree to second degree

murder (Weisstub, 1980: 656). The doctrine of diminished responsibility is applicable only when the charge is murder. On the other hand, the doctrine of partial responsibility is not concerned with the diminished capacity of the accused but with negating specific intent and thus allowing conviction for any lesser included offence (Brady, 1971: 633).

Guilty But Mentally Ill

Perhaps a more appropriate verdict to the present one of not guilty by reason of insanity would be one that says the defendant was guilty of committing the act but was mentally impaired at the time of its commission (Fingarette and Hase, 1979: 67). Legislatures in eight states have taken this approach by enabling juries to render such a verdict. They must be convinced that the defendant is mentally ill but that his mental illness does not negate his ability to understand his unlawful conduct, or the legal consequences of that conduct. If found guilty, the defendant is subject to criminal sanction, however, prior to his incarceration he undergoes a psychiatric evaluation. If the psychiatrist finds he is mentally ill, he is transferred to the state mental facility for the appropriate treatment. If

he should recover, he is transferred back to prison to complete his sentence (Kaufman, 1982).

Automatism

Automatism is the term used to describe unconscious involuntary behaviour; (Martin, 1981: 23) the individual performed the act without conscious volition. This state can occur in a healthy mind as in somnambulism or to a mind that is temporarily affected by the involuntary ingestion of a drug or intoxicant or a blow to the head (Leigh, 1962: 165). This condition is known as non-insane automatism. Insane automatism, on the other hand is due to a disease of the mind and is subsumed under the defence of insanity (Martin, 1981: 23). There are key differences between the defences of insanity (and insane automatism) and non-insane automatism when it comes to the burden of proof required for each. It is up to the Crown to establish beyond a reasonable doubt that a defendant was not acting in a state of automatism when the alleged offence was committed whereas the defendant who asserts the defence of insanity has the burden of proof (Verdun-Jones, 1979b: 67). The arbitrary legal distinction between the two is an important one to the defendant. If the defendant is successful in showing that

his automatic behaviour derived from causes other than a disease of the mind, or natural imbecility he may side-step both criminal responsibility and the consequences of the insanity defence. Thus he can leave the courtroom a free man (Verdun-Jones, 1979b: 51).

Abolition

In recent years there has been a growing movement to abolish the insanity defence, particularly in the United States. Those in favour of abolition argue that the insanity defence is senseless since it leads to confinement in a mental hospital without treatment for an indeterminate period which could likely continue for life (Weisstub, 1980: 564). No distinction is drawn between the stigma of involuntary institutionalization due to conviction and the stigma of involuntary institutionalization due to mental abnormality (Morris, 1970: 8). Many abolitionists argue that the focus should be shifted to the dispositional stage of the criminal process after an individual's guilt has been established (Martin, 1981: 30).

Some psychiatrists support the abolition view, believing the insanity defence corrupts their roles by asking them questions they can not answer under the guise

of being expert witnesses (Tanay, 1981: 134). According to psychiatrist Dr. Abraham Halpern the insanity defence is a legislative ploy, it is confusing to the jury, frustrates the psychiatric profession (Quen, 1981: 8) and goes against the interests of society in general and the defendant in particular (ABC, 1982, #216: 5). It does nothing to promote justice and in fact fosters a loss of confidence in the courts, disrespect for the law (TV0, 212609, 1982: 2) and sustains the sham of the battle of the experts in our courtrooms (Quen, 1981: 8). In addition to these reasons, Halpern states that he has not seen a deserving case of acquittal by reason of insanity in nearly thirty-five years of psychiatric practice and believes the insanity defence should be abolished (ABC, 1982, #216: 5). Other experts recommend the abolition of the insanity defence because it is archaic and irrelevant in light of the advances made in medicine and psychiatry (Gray, 1971: 582).

According to Goldstein and Katz the term insanity defence is a misnomer. It is not a defence at all but a device for detaining individuals, particularly the difficult offender, indeterminately (Goldstein and Katz, 1963: 865). The insanity defence focuses on the defendant's mental state at the time of the commission of the offence, it says nothing

of the accused's current mental condition and its treatability (Morris, 1978: 3). The abolitionists argue that since there is a short supply of trained professionals they should be utilized at the disposition and treatment stages other than as courtroom participants. It is better to treat offenders as responsible for their conduct rather than helpless victims of their illness (Weisstub, 1980: 612). According to Thomas Szasz (1963) mental illness should never release one from criminal responsibility.

There are two models that would do away with the insanity defence and both deal with mens rea. The first would have the jury consider mens rea in every case without specifically propounding an insanity defence. The second would do away with mens rea entirely and only consider the mental condition of the accused after the trial for dispositional purposes (Arboleda-Florez, 1975: 23).

The abolition of the insanity defence and the substitution of the concept of mens rea would result in an acquittal and release back into society (Morris, 1970: 8). Lady Barbara Wooton follows this line of reasoning and recommends that all inquiries into mens rea be abandoned prior to the disposition stage which is the only point at

which the offender's state of mind is relevant. Her argument is based on the view that the purpose of the criminal law is preventive rather than retributive (Schiffer, 1978: 150). The problem with this proposal is that individuals who have committed in the past and may commit again, dangerous and/or violent crimes would be returned to society (Weisstub, 1980: 565). In an attempt to deal with this problem Katz and Goldstein assert that if there is a possibility of danger to the public then the defendant should be committed via a post-trial hearing. The key difference between their proposal and the present system is that the individual would be treated the same as patients who have been committed civilly and not subject to indeterminate detention on a Lieutenant-Governor's Warrant (Verdun-Jones, 1979b). However, many hospitals refuse to admit those who have committed dangerous offences and the only way to detain such individuals is through the insanity defence. In addition to abolishing the insanity defence, attention should also be paid to the development of community based treatment programs to deal with the mentally ill offender (Weisstub, 1980) with probation orders for the non-dangerous offender with stipulations requiring them to receive psychiatric treatment.

Retention

There is no strong movement in either Britain or Canada to abolish the insanity defence which is deeply rooted in legal tradition (Martin, 1981: 30). The first decision was handed down in 1843 in the McNaghten case and there has been little change in the law of insanity over the past 142 years and no changes are anticipated in the near future. In deciding whether to retain an insanity defence it is necessary to determine whether there are any individuals who should be absolved from criminal responsibility (Morris, 1970: 8). It is believed by many that the mentally ill meet this requirement and therefore they must be protected from suffering inappropriate punishment for their criminal behaviour. Those who favour retention feel the insanity defence safeguards the rights of the weaker members of society (Gray, 1971: 385) and those who are not criminally responsible for their actions. Abraham Goldstein in his book, The 'Insanity Defence' argues that the identification of such a group of persons reinforces in so-called normal individuals a sense of obligation and responsibility (Goldstein, 1967). However, if the doctrine of mens rea was retained it is doubtful that the public's sense of personal responsibility would be weakened

(Schiffer, 1978: 52). On the contrary, many people see the insanity defence as a ploy to escape the punishment that is due criminal offenders - mentally ill or otherwise. Although there are relatively few abuses of the insanity defence they are well publicized and the opinions of the public are generally based on such cases (ABC, #216, 1982).

Retention of the insanity defence has an unacknowledged benefit to all professions concerned, it compels us to recognize the limitations of our knowledge, the deficiencies of our theories and the continuing need for specific and extended research studies. 3

3. Jacques Quen, "Anglo-American Concepts of Criminal Responsibility: A Brief History" in Hucker, S., Webster, C, and Ben-Aron, M.H. Mental Disorder and Criminal Responsibility Ontario Butterworths, 1981, p. 9

Chapter 10

CONCLUSIONS

According to the Canadian law everyone is equal before the law and entitled to a fair trial. Further to this, the law recognizes that there are some individuals that are so mentally disordered that they should not be made to stand trial. If the accused does not understand the charge or the reason for punishment the law can not look upon him as blameworthy. Whether they do not realize the personal import of the proceedings or can not direct their defence they are deemed unfit and a trial does not occur (Canada, 1976: 19).

Mental disorders may also affect the principle of responsibility; ones' accountability for their actions in relation to the criminal law. If the accused should wish to use his mental illness as a defence to negate his responsibility he will ordinarily be able to do so only through the insanity defence.

The law relating to insanity as a defence has seen a number of changes over the last few centuries. Less than 200 years ago somewhat unsophisticated tests of insanity,

such as Bracton's wilde beast test, were employed and those classified as lunatics were subject to permanent incarceration in institutions such as London's Bedlam. Medical and scientific knowledge has evolved since the wilde beast test and the result has been a number of tests of criminal responsibility, including the Durham Rule, the American Law Institute Test and, of course, the McNaghten Rules. The legal test for insanity in Canada is a somewhat modified version of the McNaghten Rules and is found in Section 16 of the Criminal Code. With the exception of a few minor amendments it has remained virtually unchanged since the 1892 Codification and is somewhat unrealistic in today's society (Verdun-Jones, 1979a: 319).

The consequences for a person found not guilty by reason of insanity and one deemed unfit to stand trial are virtually the same. They are kept in custody in a maximum security psychiatric facility until the pleasure of the provincial Lieutenant Governor is known. This procedure is known as the Lieutenant Governors' Warrant and remains in effect until it has been decided that the individual has recovered. Unfortunately a great number are not deemed to have recovered and are held for an indeterminate period. Their detention is not entirely medical or criminal, it is

not subject to appeal and does not mention treatment or therapy (Canada, 1976: 37).

The term insanity defence is a misnomer, as it is not a defence at all. The criminal law recognizes certain circumstances where the accused voluntarily committed an unlawful act, but those acts are subject to certain excuses or justifications which will lead to acquittal (Parker, 1977: 197). This is not the case with insanity, it does not act as a defence since the accused is not really acquitted, but is subject to ~~post-trial~~ sanctions.

In an attempt to determine what type of charges lead one to plead not guilty by reason of insanity fifty-nine Canadian cases were analyzed. The cases span nearly one hundred years and involve a number of different charges. Of the fifty-nine cases examined thirty-six or 61% involved homicide. Homicide refers to any act in which the life of one person is lost at the hands of another, the definition includes capital and non-capital murder, manslaughter and infanticide (Canada, 1981: 148).

Capital punishment was abolished in Canada in 1976. From 1976 to 1984, there were thirty cases where the defendant set up insanity as a defence. Of the thirty cases

twenty involved homicide, however, only five were charged with first degree murder. Between the years 1978 and 1982 there were four cases involving first degree murder where the accused appealed. Since the Canadian law requires an individual found guilty of first degree murder to serve a minimum of twenty-five years of their life sentence, indeterminate detention might offer one hope of an earlier release and therefore be a more attractive alternative.

Since murder is a serious charge and one that carries a severe penalty it is reasonable that many of the cases examined involved murder. However the fact remains that 39% of the cases were not related to homicide. Individuals were detained for committing assault, theft, robbery, possessing dangerous weapons and even one case where the defendant was charged with writing threatening letters.

Perhaps the insanity defence served a useful purpose when the possibility of capital punishment was faced by those convicted of first degree murder. However, capital punishment in Canada has been abolished for almost ten years. In addition, very few individuals take advantage of the insanity defence. Less than 1% of those charged with indictable offences between the years 1961 and

1973 were detained for insanity (Table 2). It appears that the insanity defence has outlived its usefulness and abolition should be seriously considered.

A more appropriate verdict than not guilty by reason of insanity would be guilty but mentally ill. The trial could be divided into separate proceedings, somewhat like the bifurcated trial system. The first phase would determine guilt or innocence. If the individual is found guilty his sanity would be determined in a second proceeding. If the individual is found not guilty then it is because he is not guilty and not because he is insane, he is acquitted and there is no need for a second proceeding.

In deciding the issue of sanity in the second stage, expert witnesses such as psychiatrists could be consulted and the criterion outlined in Section 16 (2), (3) and (4) of the Criminal Code could be applied. Although it has been criticized there have not been any other tests formulated, to date, that are so superior that they could replace Section 16. In addition a system of partial responsibility might be useful since there are many mental disorders which fall short of those recognized in Section 16. Evidence of abnormal mental conditions would be admissible to affect the

degree of crime for which an accused could be convicted. If the accused was disordered when he committed the crime of murder, he would be guilty of manslaughter and dealt with under the provisions of the law governing manslaughter (Speaking Out, 1982: 37). Partial responsibility differs from the doctrine of diminished responsibility in that the latter is only applicable when the charge is murder. The theory behind the defence of partial responsibility is that if the defendant is incapable of achieving the mental state required for a specific degree of a crime then he is not responsible for that particular crime. It negates the specific intent required for the completion of some offences and allows for conviction of a lesser included offence.

Much of the criticism of the insanity defence is directed at what happens to the individual after he is found not guilty by reason of insanity. The provisions for custody of those acquitted on the grounds of insanity are found in Section 542 (2) of the Canadian Criminal Code and read as follows:

542 (2) Where the accused is found to have been insane at the time the offence was committed, the court, judge or magistrate before whom the trial was held shall order that he be kept in strict custody in the place and in the manner that the court, judge or magistrate directs,

until the pleasure of the Lieutenant Governor of the province is known. 1953-54 C 51 S 423.

In essence he is sentenced just as any other convicted person, the differences lie in where the individual goes and for how long. The mentally ill individual is sent to a maximum security psychiatric hospital and not a prison and he is not afforded the luxury of knowing how long he will be there. He is not eligible for appeals, parole or mandatory supervision and his fate is in the hands of the psychiatric professionals who decide when he is ready to be released. A further difference lies in the post-sentence period. Those found not guilty by reason of insanity are subject to the prerogative of the Lieutenant Governor's Warrant for the rest of their life. They may be re-arrested for any reason. On the other hand an individual convicted in the traditional manner is free after he has completed all the conditions of his sentence.

If Section 542 (2) of the Criminal Code was abolished, an individual found guilty but insane would then be subject to a post-trial hearing, where the type and length of sentence would be determined. There are several options that would be available to the judge at this point, however, indeterminate detention would not be one. Those convicted

of a serious crime and/or deemed dangerous during the sanity stage of the trial would be sentenced to a specific period of time which could be served in a prison or psychiatric hospital, where he would have access to treatment. For those not considered dangerous, or where imprisonment would not be appropriate, they could be put on probation with an order stipulating that they receive psychiatric treatment. The court could require the individual to see a psychiatrist on an outpatient basis, reside in a group home for the psychiatrically disabled, participate in a sheltered workshop program or any other condition deemed beneficial in re-socializing and rehabilitating the individual.

Attention might also be paid to the development of more community-based assessment and treatment programs to deal with the mentally ill offender. In addition, Canadian prisons and reformatories should have adequate psychiatric services, consultants and access to psychiatric treatment (Swadron, 1973: 182).

APPENDIX I *

After the acquittal of Daniel McNaghten on the grounds of insanity in 1843 the house of Lords asked the Judiciary certain specific questions relating to the law of insanity and crime. The questions posed and the subsequent replies follow:

Question 1

What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

Answer 1

Assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is, nevertheless punishable according to the nature of the crime committed; if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Question 2

What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder for example) and insanity is set up as a defence?

Question 3

In what terms ought the question be left to the jury as to the prisoner's state of mind at the time when the act was committed?

Answer 2 and 3

As these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is 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; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing 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. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing of the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction: whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. 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: and the usual course therefore, has been to leave the question to the jury, whether the accused had sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Question 4

If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?

Answer 4

The answer must, of course, depend on the nature of the delusion: but making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes, in self-defence he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Question 5

Related to evidence of a doctor who had not examined the accused prior to seeing him in court and is deemed not relevant.

APPENDIX II

Tests of Criminal Responsibility

The McNaghten Test

(Daniel McNaghten's Case. C & F 200, 210-211, 8 Eng. Re. 718, 722-3) (1843)

Every man is to be presumed to be sane, and... to establish a defense 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.

New Hampshire Test

State vs Pike (1868)

A defendant is to be found not guilty by reason of insanity if his crime was the offspring or product of mental disease.

The Irresistible Impulse Test

A. Parsons vs. State (1887)

Did he know right from wrong, as applied to the particular act in question?... If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur:

- 1) If, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed;
- 2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

B. Davis vs United States (Federal Rule) (1897).

The accused is to be classed as insane, if though conscious of (the nature of his act) and able to distinguish right from wrong ... yet his will, by which I mean the governing power of his mind, has been otherwise than voluntary so completely destroyed that his actions are not subject to it, but are beyond his control.

The Durham Test

Durham vs United States (1954)

An accused is not criminally responsible if his unlawful act was the product of mental disease or defect.... We use "disease" in the sense of a condition which we 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.

Homicide Act

- 5 & 6 Eliz. 2. c 11, s. 2 (1957) (U.K.).

2 - (1) Where a person kills or is 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 a 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 principal 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.

The American Law Institute (ALI) Test

Model Penal Code (1962)

(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 lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

(2) As noted in the Article, the terms, "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Section 16 (Canada)

R.S.C. 1970, c. C-34, s. 16.

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

(2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him 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 him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.

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

APPENDIX III

Tests of Criminal Responsibility: Other Countries

Scotland

5.. Insanity; Intoxication. - Insanity on the part of the accused may be pleaded either in bar of trial, on the ground that it deprives the accused of power to instruct a defence; or to escape conviction, where it can be shown to have existed at the date of the act charged. The general rule regarding insanity is that no one is responsible for the commission of a crime who is prevented by mental disease: (a) from knowing the nature and quality of his act; or (b) from knowing that the act is legally or morally wrong; or (c) from controlling his own conduct, unless the absence of the power of control has been produced by his own fault. There must be an alienation of reason in relation to the act committed. Mental weakness or aberration of mind not amounting to insanity has been held, quite illogically, to reduce the guilt of a person charged with murder to guilty merely of culpable homicide. The defence of diminished responsibility applies only to murder and the Court is not likely to extend the scope of such defences (Gloag and Henderson, 1968: 737).

Mexico

Art. 996. Circumstances Excluding Responsibility. - Circumstances excluding penal responsibility are: 1. That the accused was impelled to act by an exterior irresistible physical force; 2. that at the time of the act he was in a state of unconsciousness of his acts, brought about by the accidental and involuntary use of toxic, intoxicating or inervating substances, or by an acute toxoinfectious state or by an involuntary mental disturbance (trastorno) of pathological and transitory character (Wheless, 1938: 691).

The Soviet Union

In criminal law the basic provision is art. 11 of the RSFSR Criminal Code, according to which a person who was in

a state of "non-imputability" (nevmeniaemost') while committing a socially dangerous act is not criminally responsible. The wording of art. 11 makes it clear that the concept of non-imputability is in two ways different from insanity. While insanity can be described as a more or less lasting state of mind, non-imputability is relevant only as a momentary state of mind at the time of the commission of the crime. Secondly, non-imputability has regard to specific acts, whereas insanity generally affects the legal nature of a person's entire conduct. However, the recognition by the court of the non-imputability of specific criminal acts will in fact establish a very strong presumption of non-imputability of subsequent criminal act by the same person. Therefore the admission of non-imputability "in one case, followed by an order for compulsory psychiatric treatment, tends toward recognizing a person as criminally insane. Non-imputability consists of two elements, a legal and a psychiatric one. The legal element is present when a person who has committed a crime (socially dangerous act) "could not account to himself for his actions or govern them" at the time of the commission of the crime. The formula derives from the Soviet concept of guilt in referring to the intellectual and volitional aspects of guilt. Non-imputability bars the imposition of a criminal penalty and provides the basis for ordering "compulsory measures of a medical nature" (Feldbrugge, 1973: 320).

Argentina

Art. 34. The following are not criminally liable:
 1. Anybody who at the time of the commission of the crime could not appreciate the unlawfulness of the deed or control his actions, by reason of insufficiency or diseased disturbances of his mind, of by unconsciousness, or by error of fact or ignorance for which he is not responsible. In case of insanity the court shall order the commitment of the perpetrator in an insane asylum, from which he may be discharged only by judicial decision upon hearing the public prosecutor thereon, and upon a report of the experts to the effect that the patient no longer constitutes a danger to himself or others (American Series of Foreign Penal Codes, The Argentine Penal Code, Gonzalez-Lopez, 1961: 28).

Norway

Section 44. An act is not punishable if committed while the perpetrator was insane or unconscious (American Series of Penal Codes, Norwegian Penal Code (39) Schjoldager and Backer transl. 1961: 29).

Turkey

46. Anybody afflicted with mental disease which causes a complete loss of consciousness or of freedom of action, at the time of commission of the act, shall not be punished (American Series of Foreign Penal Codes, The Turkish Criminal Code (9) Mueller, 1961: 26).

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7

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