Title: “Analysing the Court’s attitudes towards the insanity defence and the likelihood of success between 1843 to 2019”

By: Daniel Azizi

Subject: LLB Bachelors of Law

Module: Independent Study (2020 THR-OC-KED-6LA998)

Supervisor: Miss Lisa Cherkassky, LLB, PGCE(PCE), LLM, PGC (HEP), FHEA.

School/College: The University of Derby

Date: 30th April 2021

Contents Page

Introduction

This dissertation aims to gather key cases, data and articles in which judges, doctors, scholars, and academics in the fields of law and psychology analyse the law and circumstances presented to them from the year 1843 (the year in which the concept of not guilty by reason of insanity first graced the courts of law) to the year 2019, gathering more recent cases to formulate a clear progression of effectiveness and attitudes towards the insanity defence. Perlin Michael J submits that, *"insanity defence jurisprudence tends to define itself through reaction to scandalous, sensational or hysteria creating or outrageous cases"*.[1] This unpacks a whole range of cases that will be touched upon to understand how the courts have changed their decisions on how they deliver a special verdict of not guilty by reason of insanity, this will also shine a light on any critics that unravel the inadequacies or potential ambiguities of the defence as well as those that advocate its sufficiency with dealing with the mentally ill. As Sheila Hafter Gray submits, "*We need no new rules, but rather more careful application of the ones we have"*.[2] Moreover, this written piece will refer to any reforms that may have been raised throughout the years as swell as addressing any further reforms going forward in the 21st century. However, these will be met with challenge and reason for why the Insanity defence, namely the M'Naghten rules in English law are sufficient in dealing with defendants who are mentally ill.

Brief overview of the Insanity Defence

In order to be able to analyse the attitudes and effectiveness of the insanity defence, it is vital to know what the defence consists of. Derived from the 1843 case of R v M'Naghten[3] , a successful insanity defence plea presents an acquittal to any crimes of a defendant the verdict being, not guilty by reason of insanity. The case presented the test for insanity which the defendant must satisfy in order to be successful in the defence.

---

[1]Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. REV. 599 (1989). Page 609

[2] Sheila Hafter Gray, 'The Insanity Defense: Historical Development and Contemporary Relevance' (1972) 10 Am Crim L Rev 559, page 576

[3](1843) X Clarke and Finelly 200 8 E.R. 718

"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 as not to know that what he was doing was wrong"[4]

The onus of which the defence would have to argue this is on the balance of probabilities. Each limb of this defence has its each respective definition, however what this dissertation will be examining is the areas of controversy within each limb, indeed Ronney Mackay comments that *"it is not even known with any degree of certainty how many of the judges concurred in the formulation of the famous [M'Naghten]"*.[5] Showing that the rules may have been built upon shaky foundations.

Defect of reason

The first limb of the Insanity defence is 'Defect of reason' , this means that the defendant,

"who by reason of disease of the mind are deprived of the power reasoning. They do not apply and never have applied to a momentary failure by someone to concentrate."[6]

The first limb presents its own conflicts which determine the success of the insanity defence. Ronnie Mackay comments that *"something more fundamental is required to satisfy the element of defect of reason"*[7] , suggesting that the definition of this limb is too broad leaving the scope of what constitutes defect of reason to be interpreted in many ways making it more likely for this limb to be satisfied. Ronnie Mackay also makes the premonition that English law narrows defect of reason to only "*the physical aspects of the act"* [8]. Therefore, there would be a wide range of actions which could satisfy an unlawful act. While this is wide, when considering the mental aspect of this element, it is very strict and precise as seen in Clarke[9], as a simple failure to use powers of reasoning is not enough to constitute a defect of reason. This means that the courts seek a more substantial cause to satisfy defect of reason as they do not recognise momentary lapses in concentration as this would make it too broad and easy to satisfy for defendants. Although this was recognised in a 2013 discussion paper by the law

---

[4] ibid, para 4

[5] Ronnie Mackay, The M'Naghten rules - a brief historical note, Crim. L.R. 2019, 11, 966-970, para 1, In reference to R.D. Mackay, Mental Condition Defences in the Criminal Law (Oxford: Clarendon Press, 1995), p.96

[6] R v Clarke (1972) 56 Cr. App. R. 225, page 228

[7] R.D. Mackay, "Nature", "quality" and mens rea - some observations on "defect of reason" and the first limb of the M'Naghten rules, Crim. L.R. 2020, para 9

[8] Ibid, para 2

[9] (1972) 56 Cr. App. R. 225

Commission[10], It took the approach that this narrow scope for satisfying defect of reason was problematic for defendants. "*Momentary failure of concentration, even were caused by mental illness, is not insanity within the M'Naghten rules"*[11]. this would suggest that due to the increase of psychological advancement for mental diseases, new mental illnesses that potentially cause a momentary lapse in reasoning could not be used to satisfy this element under the outdated rules. The Law Commission goes on to highlight the narrow scope of defect of reason as it does not encompass abnormalities of the mind. A prominent example is a defendant who commits an action under impulse, as shown in the case of Alfred Arthur Kopsch [12].The Scoping paper refers to Professor Ashworth, who, in support of the narrow scope of defect of reason mentions that the ability to control one's own actions *"should be recognized as part of a reformed mental disorder defence"*[13], this criticism supports the much-debated archaic dealings the M'Naghten rules take to defendants which could potentially lead to a miscarriage of justice if, through these rules, the Courts refuse to acknowledge a legitimate defect of reason due to the lack of understanding in psychological development.

Wrongness limb: Legal vs Moral

According to the M'Naghten rules, a defendant is punishable, *"according to the nature of the crime committed, if he knew at the time of the committing such crime that he was acting contrary to law"*.[14] Mackay points out, that this limb has been criticised to be superfluous as *"if a defendant did not know what he was doing when he acted, he could not have known that he was performing the wrongful act charged as a crime" .*[15]

A prominent stance towards this limb was taken in the case of R v Windle[16], where the debate was focused on the meaning of 'wrong' and whether it encompasses morally wrong as well as legally wrong. It was put forth that,

---

[10] Law Commission, Criminal Liability: Insanity and Atuomatism – A Discussion paper, (2013) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity_discussion.pdf> last accessed (28th April 2021)

[11] Ibid , para 1.35

[12] R v Kopsch (1927) 19 Cr. App. R. 50

[13] 9 Principles of Criminal Law p 145 . referred to in Law Commission, Criminal Liability: Insanity and Atuomatism – A Discussion paper, (2013), para 1.35 < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity_discussion.pdf> last accessed (28th April 2021)

[14] (1843) 10 Cl & Fin 200 at 209

[15] R D Mackay, 'Righting the Wrong' Some Observations on the second Limb of the M'Naghten Rules' [2009] Crim LR 80. Para 3

[16] R v Windle [1952] 2 Q.B. 826

"Wrong, in the rule means contrary to law, and not wrong according to the opinion which the person accused or other people or other people may hold onto the question whether the act may be morally justified"[17].

It is evident that "wrong" is to only be judged by its legal definition, as a result, this narrows the criteria to satisfy this limb. Moreover, the legal definition of wrong creates a more objective approach to judging the actions of a defendant pleading insanity as opposed to a moral definition of wrong which would make it easier to satisfy due to the alternate subjective approach leading to an increased chance of a successful insanity plea. The case of James Frank Rivet[18] adds a stricter approach to what 'wrongness" ought to constitute, *"the question is not merely, was he suffering from a defect of reason due to a disease of the mind, but whether that defect was such as to render him responsible for his actions"*[19] *, this* is supported by the comments made about this case within R v Windle, "*A man may be suffering from a defect of reason, but if he knows that what he is doing is "wrong", and by "wrong" is meant contrary to the law, he is responsible ".*[20] This highlights the fact that a defendant's act can be considered legally wrong if they have the capacity to take responsibility for their actions. Regardless of the debate of what the 'wrongness' limb has undergone, its development and scope to what is considered as wrong indicates that courts have recognised the broad interpretation of wrong and decided to rectify that by including a criterion to when something can be considered as such.

Disease of mind

Through development of the law and of medical psychology, the meaning for 'disease of mind' now extends its scope to beyond a disease of the brain. This is evident through the case of Kemp[21], within which it is stated that *"there is no general medical opinion upon what category of diseases ought to properly to be called diseases of the mind"*[22] this would suggest that due to the ever-increasing knowledge of not just the human mind but the entirety of the human body, this element would prove to be easier to satisfy. Indeed, Devlin J concludes in his judgement that *" the law is not concerned with the brain but with the mind, in the sense that 'mind' is ordinarily used, the mental faculties of reason, memory and understanding".*[23] Despite the wide range of what constitutes a disease of mind, the courts have still distinguished what mind-altering conditions constitute self-intoxication, and which constitute insanity. This is identified in the case of Coley[24] where the defendant had a psychotic episode due to the intake of strong cannabis leading him to blackout and attack his neighbour with a hunting knife believing he was a character in a video game. Here Hughes LJ comments that:

[17] Ibid, para 2
[18] James Frank Rivett (1950) 34 Cr. App. R. 89
[19] ibid, para 12
[20] R v Windle [1952] 2 Q.B. 826, para
[21] Regina v Kemp (Albert) [1957] 1 QB 399
[22] ibid, 400
[23] Kemp (n21) 407
[24] [2013] EWCA Crim 223

" The precise line between the law of voluntary intoxication and the law of insanity may...be difficult to identify in some borderline cases... to engage the law of insanity, it is not enough that there is an effect on the mind, or, in the language of the M'Naghten rules, a 'defect of reason'. There must also be what the law classifies a disease of the mind".[25]

This recent distinction between self-intoxication and insanity specifically focusing on disease of mind indicates that the courts are narrowing its scopes to prevent any abuse of this this limb. However, the courts are also making it clear that regardless of medical definitions of disease of mind, the only acceptable mind-altering conditions are those which are recognised by law and therefore potentially creating a gap in the law of insanity due to the rigid approach to the definition of disease of mind taken by the courts. The law surrounding disease of mind is further defined by identifying not just the defendants state of mind at the time but how it came about, the mere fact that the defendant had a defect of reason at the time is not enough to constitute a rational explanation for insanity. As Devlin J puts in Kemp "*the rule was not intended to apply to defects of reason caused simply by brutish stupidity without rational power ".*[26] This decision to magnify the line between self-intoxication and insanity was even more distinguished as it was recognised in the case of Harris[27] where the defendant's insanity defence was considered despite the spike of controversy due to the defendant's actions brought about by voluntary intoxication. Though it was voluntary, the chronic alcoholism of the defendant caused him to develop a disease of the mind, alcoholic psychosis. It is evident that since the increased development of ailments and conditions affecting the mind, the brain can no longer be considered the only way the mind can be affected and since the year 1957 the court has been showing acknowledgement of this fact consecutively with being wary of potential abuse due to its wide range of conditions and therefore have developed fine cut distinctions between automatism (which will be discussed later), voluntary intoxication and insanity.

Automatism vs Insanity

Due to the rapid growth of psychology and studies of the human mind, the courts have had to extend their scopes to what constitutes as a disease of mind, however there was a distinction drawn in 1973 between automatism and insanity as it was of paramount importance that individuals would not try to pervert the course of justice by manipulating the defence of insanity. Indeed, it is submitted that within "*policing, the boundary between the two, the courts have traditionally attached only limited significance to medical opinion regarding mental abnormality"*.[28] This is magnified by the only test to distinguish the two defences which is whether or not the mental abnormality arose from an external or internal source. This" *not only produces unacceptable anomalies...but*

[25] Ibid At [18]

[26] Ibid (n21) para 3

[27] R v Harris(Darren) [2013] Crim L.R. 923

[28] Paul J. Sutherland and Conor A Gearty, "Insanity and the European Court of Human Rights", [1992], Crim.L.R. 418-424, para 1

can also lead to considerable injustice"[29], for a defendant who seriously injures another being sent to a psychiatric hospital instead of prison.[30]The distinction between automatism and Insanity is highlighted in the case of Quick[31] where it was distinguished that the mental defect due to disease of the mind must come from an internal source, which in the case the defendant claimed was his diabetic condition, however this was not the case as the diabetic episode occurred due to a result to an external factor, namely the type of insulin prescribed to the defendant and his failure to properly administer it. Given the ability to alter one's reasoning and control over the body, almost mirroring the defence of insanity, the defence of automatism was developed and distinguished to reflect the fault in the defendant 's actions for their criminal offences rather than putting the blame on a disease of mind as if their actions came about externally, there would be greater responsibility on the defendant to not put themselves in a position where that could occur. Having highlighted the distinction, courts still find that there is a blurred line to what constitutes an external factor and what constitutes an internal one. This line is further defined through the case of Rabey[32] where it was discussed whether the stresses of the real world can amount to an external or internal source amounting to a disease of mind. It was concluded, by Martin J, that" *The ordinary stresses and disappointments of life which are the common lot of mankind do not constitute and external cause"*[33]*. Though* stresses and disappointments in everyday life have been excluded outside the scope of automatism, they were placed under the defence of insanity should they cause a serious psychological 'disease of mind' altering judgement. This opens the floodgates to anyone who has suffered a distressing or morbid day to the possibility of raising the defence of insanity.

Social Criticism

We have witnessed first-hand how the development of psychological and neurological science has broadened our understanding of mental illnesses resulting in the attitudes towards the insanity defence and all it entails to have changed throughout the years. This has also created a social stigma, *"retaining a defence of insanity, in any form carries implications for public perception of the mentally ill"*[34] leaving most defendants reluctant to even invoke this defence as they must choose *"to either accept criminal liability, or to make a plea which opens them up to social stigma".*[35] This indicates that the courts have passively created a stigma for all insanity or mental illness consequently reflecting a negative image. It is submitted that,

---

[29] Ibid

[30] Example found in Burgess [1991] 2 W.L.R. 1206.

[31][1973] QB 910

[32] 1980 2 SCR 513

[33] Ibid, at page 514

[34] Claire Hogg, 'The insanity defence - an argument for abolition' [2015] J.Crim.L 79(4) 250 - 256, para 11

[35] ibid, para 11

"*despite increasing reliance upon expert medical evidence, there remains a tendency within criminal law to regard 'madness' as something that will make itself known in a way that is clear and recognisable to the lay person ".*[36]

it is recognised by the courts that the number of mental disorders and ailments which affect the mind has increased and are now in need of expert examination by two medical experts, however it is still retained that the term madness and insanity be under the shadow of a negative disposition. Despite it appearing that defendants are less likely to invoke the insanity defence, the courts of law have been known to apply its verdicts of not guilty by insanity generously as is prevalent in the case of Burgess[37] where the courts subjected the defendant to a psychiatric hospital for fear that the sleep walking induced violence would recure, ignoring the fact that the three medical examiners, namely Dr. Fredrick who stated that sleep walking offences are very rare, in fact it was noted, that" *although there are very few cases in the literature - in fact I know of none - in which somebody has come to court twice for a sleepwalking offence".*[38] The fact that medical examiners have in the past suggested the lack of repeat offending indicates that the courts have adopted a liberal and stubborn approach when it comes to assigning defendants to psychiatric hospitals as courts aim to prioritise the safety of society rather than deliver justice, this is submitted by lord Diplock in the leading case of Sullivan[39] that the" purpose *of the legislation relation to the defence of insanity...[is] to protect society against recurrence of the dangerous conduct".*[40] Moreover, this desire to keep society safe is magnified once again in Burgess, where it is stated that*" absence of danger of recurrence is not a reason for saying that it cannot be a disease of mind".*[41]This indicates that the courts have adopted a very wide range of what constitutes a disease of the mind in order to increase the chances of a special verdict resulting in the defendant being confined to a psychiatric hospital for the protection of society. The very stigma that the courts have created for those with mental disorders is being fuelled by the generous verdicts of Not guilty by reason of insanity.

Insanity, Courts and the ECHR

Though courts of law have adopted wide discretionary powers towards the insanity defence in order to protect society, the application of the special verdict resulting in mandatory mental health facility confinement has remained somewhat of a point of friction for the ECHR[42]. Particularly Article 5(Right to liberty and security) section E,*"the*

[36]Claire Hogg, 'The insanity defence - an argument for abolition' [2015] J.Crim.L 79(4) 250 - 256, viewpoint taken from A. Loughnan, "Manifest Madness: Towards a New Understanding of the Insanity Defence' (2007) 70(3) *Modern Law Review* 379-401.

[37] [1991] 2 W.L.R. 1206.

[38] Ibid, at page 101

[39] [1984] 1 A.C. 157

[40] [1984] 1 A.C. 157, at p.172.

[41] [1991] 2 W.L.R. 1206, at p.1212.

[42] European Convention of Human Rights (1953)

lawful detention of a person for the prevention of spreading infectious deseases, of person of unsound mind, alcoholics or drug addicts or vagrants". [43] The incompatibility lies in the fact that where it would seem that the courts are subjecting defendants who successfully plead insanity to mandatory psychiatric hospital confinement, there is no criterion on what constitutes as" unsound mind", leaving wide discretion for courts to determine this and confine defendants to mental hospitals where it sometimes may not be necessary. This absence of a definition for 'unsound mind' is highlighted in the case of Winterwerp v The Netherelands [44] where the court remarked, that the*" convention does not state what it is to be understood by the words" unsound mind"*.[45] this shows that the courts use the ever-developing field of psychology as a vehicle to create a wide scope for" unsound mind" as there is no definition of what it constitutes under Article 5. The Courts in this case take an opposing attitude towards the definition of disease of mind and have recognised the developing field of psychiatry and in doing so, have attempted to justify the lack of fixed definition to what disease of mind and unsound mind constitute,

" This term is not one that can be given a definitive interpretation...it is a term who's meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitudes to mental illness change, in particular so that a greater understanding of the problems of mental patients is becoming more widespread"[46].

However, this would still leave the highest level of discretion of what is considered a disease of mind to the court and therefore, it has been concluded that a court may not confine a person of unsound mind to a psychiatric facility without the presence and confirmation of medical evidence *"establishing that his mental state is such to justify his compulsory hospitalization".* [47]

Though this may be in place, as mentioned earlier, there is evidence of the court coming against the words of medical professionals, for example in the case of Burgess.[48] The courts find themselves in a position of having a duty to protect and respect the society by which the laws are governed over whilst trying to prevent manipulation of a defence which due to the increasing medical discoveries of mental illness, is slowly widening the scope which the M'Naghten rules use.

Past Attitudes towards the insanity Defence

Although insanity was first thought of to be used in the form of a Kings pardon at the end of King Henry III's reign, It was first established in Criminal law in the 16th century in

[43] Schedule 1, The convention: Rights and Freedoms, Article 5 s1(e), The Human Rights Act 1998
[44] (1979) 2 E.H.R.R. 387.
[45] *Ibid.*, para. 37.
[46] ibid.
[47] Ibid, para 39
[48] Ibid [n.37]

the case of Hales v Petit[49] where the defendant mortally injured himself. It was held that,

" when he gave himself the wound he was out of his senses, in which case the killing of another should not be adjudged felony in him and for the same reason he shall not be a felon for killing himself".[50]

the idea of an Insanity Defence has stemmed back long before the M'Naghten Rules, indicating that aspect of the Insanity defence as it stands currently in English law have archaic origins such as Brocton's Wild Beast concept.[51] Both cases, R v M'Naghten[52] and United States v Hinckley[53] involved public authorities with both the defendants being acquitted. The M'Naghten case *"led to substantial change in the legal rule used the determine insanity*".[54] The acquittals led to public outrage and prompted the courts to focus on developing Inanity jurisprudence. However, when,

" no sensational case is on the public's mind, insanity defence jurisprudence has developed as the outcome of a fairly uneasy détente between law and psychiatry (especially forensic psychiatry)".[55]

The courts of law have had their areas of friction when it came to working with the field of psychiatry as exemplified in the pivotal decision between medical and legal definition of disease of mind. The first noted application to insanity defence jurisprudence is from Sir Mathew Hale[56], where he distinguishes total insanity (which would lead to an acquittal) from partial insanity[57],

"Man is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law...The consent of the will is that which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so... where there is no will to commit an offense, there

---

[49] (1561) 1 Plowden 253 75 E.R. 387

[50] Ibid, page 398,

[51] Anthony M Platt, 'The Origins and Development of the Wild Beast Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility' (1965) 1 Issues Criminology 1

[52] (1843) X Clarke and Finelly 200 8 E.R. 718

[53] *United States v. Hinckley*, 672 F.2d 115 (D.C. Cir. 1982)

[54] Sheila Hafter Gray, 'The Insanity Defense: Historical Development and Contemporary Relevance' (1972) 10 Am Crim L Rev 559, Page 564

[55] Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 Case W. Res. L. REV. 599 (1989). Page 611. See F.A. Whitlock, Criminal Responsibility and Mental Illness, 1, (1963)

[56] 7 SIR MATTHEW HALE, HisToRIA PLACITORUM CORONAE (The History of the Pleas of the Crown) 14-15 (Robert H. Small ed., 1847). < https://upload.wikimedia.org/wikipedia/commons/1/15/Matthew_Hale%2C_Historia_Placitorum_Coron%C3%A6_%281st_American_ed%2C_1847%2C_vol_1%29.pdf > Last accessed (28th April 2021)

[57] Jacques.M Quen, Insanity Defence, How Far have We Strayed, Cornell Journal of Public Policy, Volume 5, Article 3, Issue 1 Fall (1995), page 29

can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offences".[58]

Regina v Oxford[59] added to the volition-based approach to which the insanity defence was heading, stating, (referring to the defendant), *"If some controlling disease was, in true, the acting power within him, which he could not resist"* [60] then he should not be held responsible for his actions. This broad approach was swiftly moved away from with the introduction of the M'Naghten rules, a *"narrow and punitive standard used today".*[61]The progression of the insanity defence during the infancy of the M'Naghten rules developed a narrow scope of what constituted the special verdict. The dilemma the courts had with the M'Naghten rules was that they defined insanity too narrowly and therefore would limit the discretion judges and juries had on applying it. Moreover, this was viewed that once there was a criterion for the defence, *"it would prevent the orderly evolution of the common law".*[62]The Narrow scope nevertheless remained, developed further by New Hampshire Supreme Court Justice Charles Doe, who gave stated that the determine whether a defendant has a disease of the mind is a*" question of fact for the jury, and not a question of law for the court".*[63] , giving the courts even less discretion. This showcases just how the discretion of the court has grown from the dawn of the insanity defence to the present day.

Modern Approaches towards the Insanity Defence

Research suggests that modern approaches towards the insanity defence are heavily centred around psychological research. However, Courts have been *"reluctant in redefining the insanity defence in light of each new scientific finding".* [64], as this would lead to a broader interpretation of the M'Naghten rules opening them to manipulation, moreover the lack of understanding by courts of psychiatric mental conditions and their treatments would overshadow the key principles of criminal responsibility. Indeed, as R D Mackay writes, a very small number of defendants successfully pleaded 'not guilty by reason of insanity' before 1990.[65] However, it should be noted that post 1990, there was a gradual increase in defendants found 'not guilty by reason in insanity', It is recorded that, from the year 1987 to the year 1996 there was an average increase of 11.6 case per year.[66] The steady increase is prevalent through 2002 to 2011, with the years 2002

---

[58] Ibid (n48) page 50

[59] (1840) 173 ER 941

[60] Ibid, page 950

[61] Jacques M. Quen, "Insanity Defense How Far Have We Strayed" , Cornell Journal of Public law and Policy, Volume 5, Article 3, Issue 1 Fall [1995], page 30

[62] ibid

[63] Boardman v Woodman 47 N.H. 120 (1866) [P] 148

[64] Sheila Hafter Gray, 'The Insanity Defense: Historical Development and Contemporary Relevance' (1972) 10 Am Crim L Rev 559, page 576

[65] R.D. Mackay, "Ten more years of the insanity defence"**,** Crim. L.R. 2012, 12, 946-954, para 2

[66] R.D. Mackay, B.J. Mitchell and Leonie Howe, Yet more facts about the insanity defence, Crim. L.R. 2006, May, 399-411, para 3

– 2006 having an average rate of 20.2 defendants found not guilty by reason of insanity, increasing from the years 2007-2011 for an annual average of 24.4.[67] The reason for this increase is not confirmed but*" One may speculate that the new legislation has become more widely known by lawyers and psychiatrist".*[68] , of course, the legislation referred to is the Criminal procedures (insanity and unfitness to plead) Act 1991 c.25[69], which due to the constant clash between medical and legal terms of what constitutes several terms in the insanity defence has now been developed to include,

" a jury shall not return a special verdict under section 2 of the Trial of Lunatics Act 1883 (Acquittal on ground of insanity) except on the written or oral evidence of two or more registered medical practitioners at least on of whom is duly approved".[70]

It was found in Mackay's research that the vast majority of cases, between 2002-2011 the jury voted not guilty by reason of insanity in instances of GBH (46) rather than murder (4) [71], affirming the premise that" i*t is not difficult to conclude that beneath the quest for truth that motivates these participants in an adversary proceeding there lies a disproportionate concern for security and order".*[72]*,* Indicating that there is a large amount of pressure on officers of the court and the jury to preserve security and order in society and therefore would rather sentence defendants capable of murder to prison rather than a mental health facility. This, as Sheila Hafta Grey confirms is largely due to" the *state's attorney, if not the judge, and jury, seem to have lost confidence in the ability of public mental health hospitals to keep the offender under civil commitment until he is cured of his disease".*[73] Despite this contradicting evidence of social security being priorities over criminal responsibility, the evidence gathered within the 21st century indicates a growth in successful insanity pleas. Upon examination, it is to be noted that the defence of insanity is inapplicable to those of strict liability, as demonstrated by the case of DPP v H[74], this is of importance as a recent case, Loake v CPS[75] brought to light a misconception of the insanity defence that the courts in DPP v H followed, which was then that an offence with an objective mens rea may not qualify for the invocation of the insanity defence. In this case, the defendant was being charged with harassment towards a former spouse. The primary point in this case was the objective definition of the offence of harassment, which was,

" the person who's course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same

---

[67] R.D. Mackay, Ten more years of the insanity defence, Crim. L.R. 2012, 12, 946-954, para 4

[68] Ibid (n56) para 3

[69] CP ACT 1991

[70] Ibid, section 1(1)

[71] R.D. Mackay, Ten More years of the insanity defence, Crim. L.R. 2012, 12, 946-954, para 7

[72] Sheila Hafter Gray, 'The Insanity Defense: Historical Development and Contemporary Relevance' (1972) 10 Am Crim L Rev 559, page 576

[73] ibid, page 577

[74] [1997] 1 WLR 1406.

[75] [2017] EWHC 2855 (admin)

information would think the course of conduct amounted to or involved harassment of another".[76]

Indeed, it reaffirmed," If *an offence is one of strict liability the defence is unavailable...however, an offence with an objective mens rea is not to be equated with an offence of strict liability".*[77] Such a recent distinction pointed out due to a misconception of what offences the defence applies to supports the premonition that the defence of insanity, although constantly developing alongside the field of psychology is nevertheless archaic in origin and therefore in need of potential reform as even now the scope of the defence is being narrowed down making it difficult to satisfy.

Suggested Reforms and Arguments for Abolition

Reforms have been made for the insanity defence in the past however there are those who would wish to abolish the rule altogether as *"the very term 'insanity,' is outdated and offensive."*[78] It comes to no surprise that the current defence of insanity is specific and narrow scoped and could lead to defendants, who clearly have some form of mental dysfunction not being able to plead insanity. The jurisprudence surrounding the insanity defence, specifically the M'Naghten rules are *"concerned only with defect of reason and take no account of emotional volitional factors "* [79], therefore, they create a very narrow scope to what is legally satisfied as insane. This is confirmed by Clair Hogg," *defendants who inevitably fall outside their remit will find themselves facing a legal system which, with respect to liability, is forced to regard them as mentally well."*[80] This view that the Insanity defence is in need of abolition is shared by few, however contrastingly, the reasons for this are in light of the defence being too broad. Indeed, the defence has been described as being an unbounded condition. It is argued that the wording in section 4 of the Criminal procedure (insanity) Act 1964[81] has left a limb which can be manipulated, for example an admission order is sufficient to classify as medical evidence[82], as confirmed in the case of R v Lewis Joseph.[83] This as it would seem put the Courts in a difficult position as though encompassing more disorders under the insanity defence would accommodate defendants and promote fairness, the broadening of the defence would also leave it to manipulation and prone to potential miscarriages of justice. Referring to potential reforms, it is important to understand that the Courts of law (not just in England) have always been slow to acknowledging new medical advancements in the fields of psychology and therefore have had difficulty accommodating certain mental conditions as they must consider the primary concerns

[76] Protection From Harassment Act 1997 c.40

[77] ibid, (n75) Para 9

[78] Claire Hogg, 'The insanity defence, An argument for Abolition', J. Crim. L. 2015, 79(4), 250-256 , para 6

[79] David Ormerod and Karl Laired, "Criminal Law" (fifteenth Edition),Oxford University Press, 2018, 305

[80] Ibid, para 13

[81] CPA 1964

[82] Sally Rumage ,'Peter Young's insanity plea: a retrospective examination of the verdict of "not guilty on the ground of insanity", Crim. Law. 2008, 183, 1-6, para 15.

[83] [2004] EWCA Crim 1212

which are public safety and criminal responsibility. Though the courts aim to exercise fairness in their trials it cannot be denied that acknowledgment of medical advancement is key to deliver such fairness. This was raised by the Scottish law commission[84], which raised the need*" to make to law more consonant with current medical understanding of mental disorder".*[85] This matter was also raised by the Royal Commission in which it mentioned that there were,

" Deffective communications springing primarily from loose usage of terms and imprecisions of definitions in these areas, is all too frequent between speakers, writers and readers. Diagnostic groupings from the field of medicine are not easily transferrable to the field of law".[86]

The report goes on to identify the key areas in which the inconsistency lies. Firstly, It is found that the courts seem to have a chaotic relationship between prioritising moral responsibility or criminal responsibility, moreover (as mentioned previously) that the term "disease of mind "needs concrete definition to which all internal ailments that affect reasoning and control should fall under to avoid miscarriage of justice, but more prominently, encapsulate any newfound developing medical discoveries which may harbour under such a definition. Returning upon the idea of the abolition of the insanity defence all together, reforms in the form of completely new verdicts have suggested, such as 'not guilty on evidence of mental disorder' which was proposed in the Butler Committee review[87]. This would broaden the definition and synergise with the constant development of psychology. Indeed, the Law Commission has published a scoping paper in regard to the insanity defence, highlighting any significant ambiguities or gaps in the defence which need to be rectified. The paper firstly makes reference to the outdated method of determining whether a defendant should have criminal responsibility which the prosecution must prove they did in fact have the ingredients for the act or omission. They need not concern themselves with the mens rea. This conflicts with few offences as" *In recent years, large numbers of offences have been created which blend a mental element into the actus reus"*[88],as showcased in the case of Loake v CPS[89]. Reforms have been made in light of acknowledgement of new mental health defences, as" terms *like 'insanity' and 'disease of mind' are not medical terms but outdated legal terms".*[90], this shows that while medical advancements are being made the laws governing the insanity defence are archaic and therefore do not accredit to the

[84] Scottish Law Commission, *'Report on Insanity and Diminished Responsibility'*, (Scot Law Com No 195, 2004)
[85] Ibid, para 2. 12

[86] Melvin F. Wingersky, Report of the Royal Commission on Capital Punishment, 44 J. Crim. L. Criminology & Police Sci. 695 (1953-1954) , page 704
[87] HL Deb, 22 March 1978, Vol 389, Col 1822
[88] Law Commission, Criminal Liability: Insanity and Atuomatism – A Discussion paper, (2013) para 1.33 < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity_discussion.pdf> last accessed (30th April 2021)

[89] Ibid, (n75)
[90] Ibid, (N.88) para 1.56

acceptance of ever developing medical conditions and diseases which do alter the mind. In Principle, the paper refers to a completely new defence among other proposals which would be statutory in nature, this would be where someone is not criminally responsible by reason of qualifying medical condition.[91] The desire to reinvent the defence of insanity into a statutory defence indicates that the courts attitudes have shown acknowledgement of the inadequacies and difficulties the old rules contain, and in the interest of criminal responsibility combined with the interest of social security, the courts desire to satisfy these whilst still binging about justice accordingly.

Conclusion

The question of what the attitudes towards the insanity defence have been changing since even before the M'Naghten rules. But in English law, the M'Naghten rules were birthed out of controversy and recognition of mental incapacity and disorder in its infancy. However, even before the 21st century, the rules have implemented narrow scopes to satisfy each element such as "defect of reason". Moreover, many of the elements contained within the rules have had much debate over the years such as what constitutes "disease of Mind" and the determination of 'wrong'. These ambiguities in the defence Is what made it so uncertain despite the development of the insanity defence through case law. Upon examination, these ambiguous or ill-defined terms are constantly being developed through other contexts such as medical definitions of disease of mind or moral interpretations of wrong whereas the legal definitions of these and all they encompass have stayed rigid and the same, with the courts reluctant to reform or update these definitions. Though the insanity defence is developed through case law, it is adamant in keeping the archaic definitions contained in the terms of the M'Naghten rules whilst attempting to remain in sync with developing medical knowledge of the mind. Attitudes towards the M'Naghten rules have varied due to the incompatibility with the European Convention of Human Rights, namely the generous application and wide scope of the insanity defence at the court's discretion, this is supported by the increase in cases each year as discussed above. The reason for this generous application however is due to the interest in social safety though there has been little understanding to those who plead insanity for the offence of murder as there is no guarantee that confinement of a psychiatric facility would help. Moreover, the use of this defence has developed a negative and almost villainous stigma unto to people suffering from mental disorders, meaning that whilst the scope for insanity is narrow to satisfy, it is a less favoured defence to be chosen by defendants in the first place. The M'Naghten rules have constantly been criticized that they are outdated, to the point where they do not seem reformable but rather should be abolished with a new defence in place, namely the defence of not guilty by reason of recognised medical disorder. As a result of no such reformation having been conducted it seem like going forward with the likelihood of success, the number of successful verdicts will slow down as eventually medical advancement will overtake the development of case law for the defence and eventually the two will no longer be compatible and unless there is a change in the

[91] Ibid, para 10.12

defence or total abolition, then it will be incredibly difficult to successfully plea insanity in the future.

Table of Cases

- Boardman v Woodman 47 N.H. 120 (1866) [P] 148
- R v Burgess [1991] 2 W.L.R. 1206.
- R v Clarke (May) (1972) 56 Cr. App. R. 225,
- R v Coley (Scott) [2013] EWCA Crim 223
- DPP v H [1997] 1 WLR 1406
- Hales v Petit (1561) 1 Plowden 253 75 E.R. 387
- R v Harris(Darren) [2013] Crim L.R. 923
- James Frank Rivett (1950) 34 Cr. App. R. 89
- Regina v Kemp (Albert) [1957] 1 QB 399
- R v Kopsch (1927) 19 Cr. App. R. 50
- R v Lewis Joseph [2004] EWCA Crim 1212
- Loake v CPS [2017] EWHC 2855 (admin)
- R v M'Naughten (1843) X Clarke and Finelly 200 8 E.R. 718
- Regina v Oxford (1840) 173 ER 941
- R v Quick [1973] QB 910
- Rabey v R 1980 2 SCR 513
- R v Sullivan [1984] 1 A.C. 157
- United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982)
- R v Windle [1952] 2 Q.B. 826
- Winterwerp v The Netherelands (1979) 2 E.H.R.R. 387.

Legislation –

Schedule 1, The convention: Rights and Freedoms, Article 5 s1(e) The Human Rights Act 1998
Criminal procedures (insanity and unfitness to plead) Act 1991 c.25
Criminal procedure (insanity) Act 1964
European Convention of Human rights 1953
Protection From Harassment Act 1997 c.40

Bibliography

Journals

- Anthony M Platt, 'The Origins and Development of the Wild Beast Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility' (1965) 1 Issues Criminology 1
- A. Loughnan, "Manifest Madness: Towards a New Understanding of the Insanity Defence' (2007) 70(3) *Modern Law Review* 379-401.
-
- Butler Committee review HL Deb, 22 March 1978, Vol 389
- Claire Hogg, 'The insanity defence - an argument for abolition' [2015] J.Crim.L 79(4) 250 - 256
- Jacques M. Quen, "Insanity Defense How Far Have We Strayed" , Cornell Journal of Public law and Policy, Volume 5, Article 3, Issue 1 Fall [1995]
- Melvin F. Wingersky, Report of the Royal Commission on Capital Punishment, 44 J. Crim. L. Criminology & Police Sci. 695 (1953-1954)
- Michael L. Perlin, Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence, 40 Case W. Res. L. REV. 599 (1989)
- Paul J. Sutherland and Conor A Gearty," Insanity and the European Court of Human Rights", [1992], Crim.L.R. 418-424,
- R.D. Mackay, B.J. Mitchell and Leonie Howe, Yet more facts about the insanity defence, Crim. L.R. 2006, May, 399-411
- R.D. Mackay, "Nature", "quality" and mens rea - some observations on "defect of reason" and the first limb of the M'Naghten rules, Crim. L.R. 2020
- R.D Mackay, 'Righting the Wrong' Some Observations on the second Limb of the M'Naughten Rules' [2009] Crim LR 80
- R.D. Mackay, "Ten more years of the insanity defence", Crim. L.R. 2012, 12, 946-954
- Ronnie Mackay, The M'Naghten rules - a brief historical note, Crim. L.R. 2019, 11, 966-970
- Sally Rumage ,'Peter Young's insanity plea: a retrospective examination of the verdict of "not guilty on the ground of insanity", Crim. Law. 2008, 183, 1-6
- Scottish Law Commission, 'Report on Insanity and Diminished Responsibility', (Scot Law Com No 195, 2004)
- Sheila Hafter Gray, 'The Insanity Defense: Historical Development and Contemporary Relevance' (1972) 10 Am Crim L Rev 559
- 7 SIR MATTHEW HALE, HisToRIA PLACITORUM CORONAE (The History of the Pleas of the Crown) 14-15 (Robert H. Small ed., 1847).

Books

- David Ormerod and Karl Laired," Criminal Law" (fifteenth Edition),Oxford University Press, 2018, 305
- F.A. Whitlock, Criminal Responsibility and Mental Illness, (1, 1963,Butterworth & Co Publishers Ltd)
- R.D. Mackay, Mental Condition Defenses in the Criminal Law (Oxford: Clarendon Press, 1995)

Websites

- Law Commission, Criminal Liability: Insanity and Atuomatism – A Discussion paper, (2013) < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/06/insanity_discussion.pdf > Last Accessed (1st May 2021)
- 7 SIR MATTHEW HALE, HisToRIA PLACITORUM CORONAE (The History of the Pleas of the Crown) 14-15 (Robert H. Small ed., 1847). < https://upload.wikimedia.org/wikipedia/commons/1/15/Matthew_Hale%2C_Historia_Placitorum_Coron%C3%A6_%281st_American_ed%2C_1847%2C_vol_1%29.pdf > Last accessed(1st May 2021)