

**Diminished Responsibility as a Defence in Ireland having Regard
to the law in England, Scotland and Wales**

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The candidate confirms that the work is her own and that appropriate credit has been given where reference has been made to the work of others.

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Abstract

This thesis is an inquiry into the necessity of a diminished responsibility defence in Irish law. The inquiry examines the controversy surrounding each attempt to reformulate the insanity defence in the Anglo-American world. The thesis looks at the success of the English defence of diminished responsibility in abating the controversy in that jurisdiction. Following an analysis of the need for diminished responsibility in Irish law, the thesis deals with the appropriate form of an Irish diminished responsibility defence.

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INTRODUCTION

The Homicide Act, 1957 which introduced the defence of diminished responsibility into English law, has no equivalent in Ireland. There the law's only concession to mental abnormality is the insanity defence, which provides a total exemption from criminal liability. Diminished responsibility, however, reduces murder to manslaughter on evidence of mental abnormality and is founded on the premise that the defendant is less guilty than a normal offender. The Irish insanity defence has been altered from its initial form comprising solely of the McNaghten Rules, which were inherited from England as the test of insanity following independence in 1922. From this time onwards developments in the law of insanity in each jurisdiction diverged widely. The McNaghten Rules had attracted incisive criticism in both jurisdictions. However, while Ireland concentrated on reformulating the insanity defence, England introduced a partial defence of diminished responsibility.

This thesis examines the success of the English approach in abating the controversy over the insanity defence, which the Irish expedient failed to do. It should be borne in mind, where not specified, that this argument is limited solely to murder cases because of the diminished responsibility defence's limited application. This examination will begin in Chapter One by scrutinising the reasons for the inadequacy of the McNaghten Rules in performing their stated function *viz*, excusing the insane from punishment for their criminal acts. From Chapter One it will be seen that subsequent attempts to soften their harshness merely served to exacerbate the controversy, a controversy which intensified until the introduction of diminished responsibility *via* the Homicide Act, 1957. In recent years the English controversy over McNaghten has resurfaced, fuelled, no doubt, by American proposals for abolition of the insanity defence. I will trace the origin of the polemic in the difficulty of deciding who should be responsible (and who should not), especially in murder cases, and in the long-standing tension between law and psychiatry over who should have the final decision on this matter. This will show that the abolitionists' suggestion

and the more recent test proposed by the Butler Committee are no match for the Herculean challenge posed by reformulation of the insanity defence.

Chapter Two opens with a discussion of the origin of the English defence of diminished responsibility and the events which led to its introduction into English law. This will reveal that the defence of diminished responsibility was a half-hearted response to growing pressure for abolition of the death penalty. Although hastily implemented by parliamentarians who were largely ignorant of the issue they were voting on, the operation of the defence of diminished responsibility has been a success. Firstly, it has led to a satisfactory resolution of the medico-legal conflict at the heart of the controversy over the insanity defence. Secondly, it has spared mentally abnormal murderers falling outside the penumbra of the McNaghten Rules and several other criminal law defences from the stigma of a murder verdict and its consequence of capital punishment or, today, the mandatory life sentence. Thirdly, due to developments in the law on insanity in recent years, the defence's flexible disposal consequences have facilitated a just disposition where a finding of insanity would have resulted in indefinite hospitalisation.

In Chapter Three I will examine the Irish insanity defence which comprises the McNaghten Rules and an irresistible impulse test. I will illustrate the unsatisfactory nature of the Irish insanity defence and the mandatory indefinite hospitalisation which accompanies it. Particular emphasis will be placed on its failure to conform with the Irish Constitution and the European Convention on Human Rights. Drawing on the lessons which have been taught to us in Chapter One from the English and American attempts to improve McNaghten, I will argue that neither irresistible impulse nor any other reformulation will prove as satisfactory as the introduction of diminished responsibility into Irish Law.

I will then trace the growing support in Ireland since the 1970's for a defence of diminished responsibility. This will reveal the weight of authority which is in favour of an Irish diminished responsibility defence. Some final justifications will be offered for a defence of diminished responsibility which will reveal that the present

Irish judicial climate is favourable to the introduction of diminished responsibility. However, viewed against a background of legislative inertia, it may still be a considerable length of time before Ireland acquires a defence of diminished responsibility.

I will then attempt to provide some guidelines for the Irish Legislature when legislating for an Irish defence of diminished responsibility. The Irish Legislature can learn from the experience of the English diminished responsibility defence and improve on its shortcomings. The principal deficiency of the English defence lies in the elliptical language which comprises it. Exposition in Parliament of its elliptical nature and a more thoroughgoing analysis of the defence's aspirations might have resolved its precise scope and spared the early prevarications of the courts, on whom the burden of deciphering the meaning and delineating the scope of the defence ultimately fell. Nonetheless, the vagueness of the defence has undoubtedly contributed to the defence's success. This vagueness has allowed the psychiatric profession a considerable role in the operation of the defence. I will conclude by providing specific guidelines for the Irish Legislature on the procedural issues of burden of proof, charges of diminished responsibility manslaughter and disposition and by attempting to reconcile the two conflicting considerations of clarity and vagueness in a proposed Irish defence of diminished responsibility.

This inquiry into the need for a diminished responsibility defence in Irish law and the form it should take, is carried out using academic commentary, case-law, official publications, Parliamentary debates and criminal statistics prior to 31/8/1995.

CHAPTER ONE

THE MCNAGHTEN RULES AND VARIOUS PROPOSALS FOR CHANGE

"No problem in the drafting of a penal code presents larger intrinsic difficulty than that of determining when individuals whose conduct would otherwise be criminal ought to be exculpated on the ground that they were suffering from mental disease or defect when they acted as they did"¹.

1.1 MCNAGHTEN'S CASE

The theme of this chapter is the unsatisfactory nature of the insanity defence in England and the controversy which attempts to improve it have generated. This I illustrate by discussing the insanity defence as it stands at present, the long-standing campaign to add irresistible impulse to the test of insanity, the proposal of the Royal Commission on Capital Punishment (1949-53)², more recent proposals to abolish the defence of insanity altogether and the proposal of the Butler Committee on Mentally Abnormal Offenders (1975)³. Although pre-1922 proposals purported to apply in Great Britain *and* Ireland, all of the alterations proposed since 1922 have purported to apply only in Great Britain.

I intend to take as my starting point the McNaghten Rules which form the test of insanity in both England and Ireland and which are considered to be "*the* point of reference for the insanity plea's history"⁴. Pre-McNaghten authorities have long-since been regarded as mere "antiquarian curiosities"⁵.

¹ Quoted from Draft Four of the American Law Institute's Model Penal Code by Fingarette *The Meaning of Criminal Insanity* (Los Angeles, 1972) p.1

² Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 (London, 1953)

³ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 (London, 1975)

⁴ R. Smith *Trial by Medicine* (Edinburgh, 1981) p.3

⁵ J. Fitzjames Stephen *A History of the Criminal Law of England* Vol.ii (London, 1883) p.150

The Rules arose out of the highly controversial acquittal on the grounds of insanity of Daniel McNaghten, for the murder of Sir Robert Peel's private secretary. As a result, on March 13th 1843 the House of Lords took the unusual (though not unprecedented) step of formulating a series of questions for the consideration of the judges of England. Lord Brougham's stated reason for putting the questions to the assembly of judges was his belief that their answers "would lead to more uniformity in the language they used on future occasions in charging and directing juries on this most delicate and important subject...They would no longer indulge in that variety of phrase which only served to perplex others, if it did not also tend to bewilder themselves, as he supposed it sometimes did; but they would use one constant phrase, which the public and all persons concerned would be able to understand"⁶.

Following a debate in the House of Lords⁷ the judges were asked the following questions:-

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?
2. What are the proper questions to be submitted to the jury when 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?
3. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?
4. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?⁸

⁶ Hansard's Debates (1843) Vol.LXVII 714 pp.732 & 733

⁷ ibid

⁸ The 5th question is not relevant to my thesis.

The answers given⁹, are known as the McNaghten Rules and they have been applied ever since in determining the criminal responsibility of insane offenders. They are:-

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 revenging 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...

The answer to question 1. can be read in conjunction with the answer to question 4. which also dealt with delusions.

...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 the 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 2. and question 3. were answered together and have come to be regarded as the heart of the Rules¹⁰:-

...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 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. This 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 the

⁹ 10 Cl.& Fin.200

¹⁰ N.Walker *Crime and Insanity in England*, Vol.1 (Edinburgh, 1968) p.100

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 party accused had a 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.

To establish a successful plea of insanity, therefore, it must be proved that the accused at the time of the act, was labouring under such *defect of reason from disease of the mind that he did not know the nature and quality of his act and if he did know this, he did not know that it was wrong*¹¹.

The meaning of these key words has been settled by precedent. In R v Clarke¹² the Court of Appeal held that "defect of reason" does not include mere failure to exercise reasoning powers which are still intact. "Disease of the mind" has a legal rather than a medical meaning¹³ and has been construed broadly so as to include mental disorders which are functional or organic, permanent or transient and intermittent or whose source is physiological, provided that the disorder has impaired the mental faculties of "reason memory and understanding"¹⁴. In Bratty v A.G. for Northern Ireland¹⁵, Lord Denning went so far as to say that "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind". It now appears that absence of the danger of recurrence is not a reason for saying that

¹¹ P.Devlin "Responsibility and Punishment: Functions of Judge and Jury" [1954] Crim.L.R.661 pp. 678 & 679 says that the first requirement, that the accused did not know the nature and quality of his act, is practically obsolete as anyone who does not know the nature and quality of his act is mad in the popular sense and so will be found unfit to plead at all.

¹² [1972] 1 All.E.R.219

¹³ Smith and Hogan op cit p.197

¹⁴ R v Kemp [1956] 3 All.E.R.249; R v Sullivan [1983] 2 All.E.R.673

¹⁵ [1961] 3 All.E.R.523 p.534

an abnormal condition cannot be a disease of the mind¹⁶, provided that its cause can be considered "internal" to the defendant rather than "external"¹⁷. The meaning of "nature and quality" of the act has been defined as an understanding of the physical nature of the act¹⁸ and "wrong" implies knowledge of the illegality of the act¹⁹.

These interpretations have been subject to a great deal of criticism in the considerable body of literature which has grown up around the Rules. By drawing on this literature *below* I hope to show why the Rules caused as much controversy as they did.

1.1.2 Criticism of the Rules

Criticism of the Rules commenced in the House of Lords itself²⁰. Maule J. protested that the questions were put without reference to the facts of any particular case, that there had been no debate on them and that the answers given might embarrass the administration of justice²¹.

Tindal C.J. protested that

"they deemed it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute application of the principles involved in the Answers"²².

Although the status of the Rules was questionable, there is no doubt that they have acquired authority through repeated reference to them²³. However, their extension in R v Windle to cover all cases of insanity (and not just delusion) has been

¹⁶ *R v Burgess* [1991] 2 All.E.R.769

¹⁷ This doctrine was introduced into English law by *R v Quick and Paddison* [1973] 3 All.E.R.347

¹⁸ *R v Codere* (1916) 12 Cr.App.R.21

¹⁹ *R v Windle* [1952] 2 All.E.R.1

²⁰ H. Barnes "A Century of the McNaghten Rules" (1944) 8 C.L.J.300 p.308

²¹ *R v McNaghten* 10 Cl.& Fin.p.204

²² *ibid* p.208

²³ H.Barnes op cit p.302

most controversial²⁴, as the questions and answers were framed solely with reference to delusions.

The most incisive criticism of the Rules has probably been the fact some insane offenders went to the gallows because the tests were too narrow a criterion of responsibility²⁵. Although the death penalty has long been abolished in England and Ireland, the McNaghten Rules continue to wreak fierce injustice. The interpretation of "wrong" as meaning knowledge of the legal wrongness of the act²⁶ greatly narrows the scope of the insanity plea since even grossly disturbed persons generally know that murder, for example, is a crime²⁷. The correctness of this interpretation is in fact questionable in light of the judges' statement in **McNaghten** that

"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 every one 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"²⁸.

The scope of the Rules was restricted by the interpretation of "nature and quality" to mean the physical quality of an act²⁹. This excludes the offender who knows what he is doing but does not appreciate the impact of his act or its consequences. Stephen argued that knowledge required a deeper level of understanding than "mere knowledge"³⁰, but the courts have not required an

²⁴ S.Glueck *Mental Disorder and the Criminal Law* (Boston, 1925) pp.168,180 & 426.

²⁵ Report of the Committee on Insanity and Crime Cmd 2005 op cit p.293

²⁶ *R v Windle* (1952) 2 All.E.R.1

²⁷ Report of the (Butler) Committee on Mentally Abnormal Offenders op cit para.18.8

²⁸ 10 Cl.& Fin.200 p.210

²⁹ *R v Codere* (1916) 12 Cr.App.R.21

³⁰ Stephen op cit p.166

appreciation or understanding of the nature, quality or wrongness of an act, thereby excluding a vast number of medically insane offenders from the ambit of the insanity plea. The broadness with which "disease of the mind" is interpreted (requiring simply that the disease be internal to the defendant³¹) has led to epileptics³², diabetics (in a state of hyperglycaemia)³³ and sleep-walkers³⁴ being classified as insane. No argument is needed to show that the indefinite confinement of the above-named classes of offenders, who on a common sense interpretation of the word could not possibly be considered insane, is unjust (although the situation in England has been ameliorated somewhat by the Criminal Procedure (Insanity and Unfitness to Plead) Act, 1991 which has introduced discretionary disposal consequences for those who plead insanity to offences which do not carry a fixed sentence). Furthermore, in deciding that a condition is a "disease of the mind" for the purposes of the Rules, the courts need not take account of the fact that the condition will not recur³⁵. It is *dicta* like these which have provoked the criticism that the Rules "have been interpreted with all the clinical detachment of a tax statute"³⁶.

It is also likely that the McNaghten Rules are in breach of Article 5(1)(e) of the European Convention on Human Rights. In order to conform with Article 5(1)(e), hospitalisation following an acquittal of criminal charges must be a "lawful detention" of a person "of unsound mind"³⁷. Public policy or perceived dangerousness are not criteria which justify deprivation of liberty under the European Convention. However in Burgess³⁸ these appear to be the factors which led to the application of McNaghten. Sullivan³⁹ pleaded guilty to avoid a finding of insanity and consequent indefinite committal.

³¹ *R v Quick and Paddison* [1973] 3 All.E.R.347

³² Since *R v Sullivan* [1983] 2 All E.R.673

³³ Since *R v Quick and Paddison* [1973] 3 All.E.R.347

³⁴ *R v Burgess* [1991] 2 All.E.R.769

³⁵ *R v Sullivan* [1983] 2 All.E.R.673; *R v Burgess* [1991] 2 All.E.R.769

³⁶ P.J.Sutherland and C.A.Gearty "Insanity and the European Court of Human Rights" [1992]

Crim.L.R. 418 p.421

³⁷ See *ibid* pp.422-424

³⁸ [1991] 2 All E.R.769

³⁹ [1983] 2 All E.R.673

Section 1(1) of the Criminal Procedure (Insanity and Unfitness to Plead) Act, 1991 lays down that the jury must hear medical evidence from at least two medical practitioners before returning an insanity verdict, one of whom must be "duly approved" by the Secretary of State under section 12(2) of the Mental Health Act, 1983 "as having special experience in the diagnosis or treatment of mental disorder". At first glance this appears to bring the McNaghten Rules within the terms of Article 5(1)(e), which has been interpreted as requiring psychiatric evidence of mental illness and of the need for compulsory confinement⁴⁰. In reality however, the necessary medical evidence under section 1 lacks any binding force⁴¹ and so the Rules continue to be in breach of the European Convention, at least in murder cases where indefinite hospitalisation remains the only possible disposal, and in the case of other offences, where the chosen method of disposal involves the deprivation of liberty.

In recent years Lord Brougham's aspiration of a clear definition of legal insanity has not been realised and "[i]t is doubtful whether there is any field of law in which there has been as much confusion and variation in interpreting the very same words of a seemingly simple legal formula as there has been in the court-room operation of the McNaghten rules"⁴². The majority of witnesses who gave evidence to the Royal Commission on Capital Punishment (1949-53) were of the view that the Rules were now more liberally interpreted by judges, some going so far as to say that "interpretation" might occasionally mean that the words were twisted into a meaning that could not reasonably be put on them, or even that the Rules might be ignored altogether⁴³. The implications of this are revealed by the evidence of Mr Justice Frankfurter to the Royal Commission⁴⁴:

"If you find rules that are, broadly speaking, discredited by those who have to administer them, which is, I think, the real situation, certainly with us - they are honoured in the breach and not in the observance -

⁴⁰ *Winterwerp v the Netherlands* (1979) 2 E.H.R.R.387 para.39

⁴¹ E.Baker "Human Rights, M'Naghten and the 1991 Act" [1994] Crim.L.R.84 p.86

⁴² S.Glueck *Law and Psychiatry* (London, 1963) p.45

⁴³ Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 op cit para.232

⁴⁴ ibid para.290

then I think the law serves its best interests by trying to be more honest about it..I think that to have rules which cannot rationally be justified except by a process of interpretation which distorts and often practically nullifies them, and to say the corrective process comes by having the Governor of a State charged with the responsibility of deciding when the consequences of the Rule should not be enforced, is not a desirable system..I am a great believer in being as candid as possible about my institutions. They are in large measure abandoned in practice, and therefore I think the M'Naghten Rules are in large measure shams".

Their main criticism from a medical point of view is that they over-emphasize the cognitive aspect of mental functioning and ignore the affective and conative aspects⁴⁵.

"The modern science of psychology..does not conceive 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. The tendency of psychiatry is to regard what ordinary men call reasoning as a rationalization of behavior rather than the real cause of behavior"⁴⁶.

The Rules are founded on the now "half scientific, half fantastic"⁴⁷ doctrine of phrenology, (first put forward by Franz Gall, a Viennese physician, at the turn of the 18th century) which divides the mind into separate compartments and assumes that each aspect of mental functioning can operate independently of the others. This doctrine has long been totally discredited⁴⁸. The Rules have been criticised for assuming that although one region of the brain may be diseased e.g. volition, the mind may be sound in all its other aspects and that reason or understanding may function

⁴⁵ S.Glueck, *Mental Disorder and the Criminal Law* op cit pp.173,180,184,423 & 425.

⁴⁶ *Holloway v U.S.* (1945) 148 F.2d. 665 (1945) p.667

⁴⁷ S.Glueck *Mental Disorder and the Criminal Law* op cit p.170

⁴⁸ See G.W.Keeton, *Guilty but Insane* (London, 1961) p.193.

perfectly⁴⁹. In fact one critic goes so far as to say that the judges' stipulation - "assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane", vitiates any credibility that the Rules might have as criteria of responsibility as "this is a class of offender that does not exist and never has existed"⁵⁰.

The judges' treatment of delusion (questions 1. and 4.) has been much criticised, especially their assumption that a deluded man can reason as a sane man and should be judged by the same standard⁵¹. This in effect, makes the courts pick and choose between delusions⁵². According to Stephen, to a sane man, the belief that his finger was made of glass "would supply no reason for taking any particular view about murder, but if a man is mad and such a belief is a symptom of his madness, there may be a connection between the delusion and the crime as insane as the delusion itself"⁵³. Fortunately this objection is of less practical importance today since the scenario of the deluded offender in question 1. is now governed by the knowledge tests⁵⁴. Another valid criticism is that by focussing entirely on knowledge of the nature and quality of the act and its wrongness, the court is apt to lose sight of what should be the central issue:- a defect of reason caused by disease of the mind⁵⁵. Sutherland and Gearty assert that the courts have traditionally attached only limited significance to medical opinion regarding mental abnormality⁵⁶ and McAuley speaks of "the relatively neglected notion of 'disease of the mind'"⁵⁷.

The Rules are framed in such a way that psychiatric testimony is limited to an account of the accused's cognitive powers. The fact that psychiatrists cannot give an overall account of the accused's condition, which would paint a much more realistic picture than snippets of information do, has provoked strong dissatisfaction amongst

⁴⁹ S.Glueck, *Mental Disorder and the Criminal Law* op cit pp. 124,125, 424, & 426.

⁵⁰ C.Mercier, *Criminal Responsibility* (London, 1905) pp.174 & 176.

⁵¹ W.C.Sullivan, *Crime and Insanity* (London, 1924) p.130.

⁵² A.Norrie *Crime Reason and History A Critical Introduction to Criminal Law* (London, 1993) p.179

⁵³ J.Fitzjames Stephen op cit p.162

⁵⁴ Perkins and Boyce *Criminal Law* (3rd edition) (New York, 1982) p.967.

⁵⁵ W.C.Sullivan op cit p.130

⁵⁶ P.J.Sutherland and C.A.Gearty "Insanity and the European Court of Human Rights" op cit

⁵⁷ F.McAuley *Insanity, Psychiatry and Criminal Responsibility* (Dublin, 1993) p.62

the medical profession⁵⁸. Goldstein, however, claims that there is virtually no support in law for the view that McNaghten is responsible for inhibiting the flow of testimony on the insanity issue⁵⁹ but that prolonged criticism of the Rules has convinced psychiatrists that they cannot give a full account of the accused's mental life and that the critics have in fact "created the very devil they were trying to exorcise"⁶⁰.

On the other hand there are some staunch defenders of the Rules. As Baron Bramwell said in his evidence before the Select Committee on the Homicide Law (Amendment) Bill in 1874⁶¹

"I think that although the present law lays down such a definition of madness, that nobody is hardly ever really mad enough to be within it yet it is a logical and good definition."

Lady Wooton has praised the intellectualist quality of the McNaghten formula which, she says, makes it "a model of clarity and precision"⁶². In the light of the defence of irresistible impulse, discussed *below*, she praises the McNaghten Rules, saying

"The state of a man's intellect or knowledge is much more easily tested by such court procedures as cross-examination, than is say, the state of the will"⁶³.

The Rules have also been commended on the grounds that they are in harmony with the law's fundamental doctrine of *mens rea*.

⁵⁸ W.C.Sullivan op cit p.242.

⁵⁹ A.Goldstein *The Insanity Defense* (New Haven and London, 1967) pp.53 & 54

⁶⁰ *ibid* p.212

⁶¹ Report and Minutes of Evidence before the Select Committee on the Homicide Law Amendment Bill B.P.P.,1874, Vol. ix p.475 p.27

⁶² Lady Wooton "Mental Disorder and the Problem of Moral and Criminal Responsibility" in *Social Science and Social Pathology* (London, 1959) p.229

⁶³ *ibid* p.230

"As part of the doctrine of *mens rea* it ensures that a man who does an injurious act without appreciation of its consequences does not forfeit the protection of the law. But the failure to appreciate must be total, for, if he has an appreciation in some degree, he is rightly made answerable to the law"⁶⁴.

Later Lord Devlin says

"there is something logical - it may be astringently logical, but it is logical - in selecting as the test of responsibility to the law, reason and reason alone. It is reason which makes a man responsible to the law. It is reason which gives him sovereignty over animate and inanimate things. It is what distinguishes him from the animals, which emotional disorder does not; it is what makes him man; it is what makes him subject to the law. So it is fitting that nothing other than a defect of reason should give him complete absolution"⁶⁵.

McNaghten's critics on the other hand, argue that *mens rea* requires volition⁶⁶ and also requires a guilty *healthy* mind⁶⁷.

As the above discussion reveals, much ink has been spent on criticising the McNaghten Rules. Many of the critics have advocated different tests of insanity. Of these the irresistible impulse test has gathered the most supporters in English and Irish Law. I will now examine its history and attempt to discover why, in light of McNaghten's inadequacies, it failed to win acceptance in English law.

⁶⁴ Lord Devlin "Mental Abnormality and the Criminal Law" in R.St.J.Macdonald *Changing Legal Objectives* (Toronto, 1963) p.83

⁶⁵ *ibid* p.85

⁶⁶ S.Glueck *Mental Disorder and the Criminal Law* op cit pp.173 & 180

⁶⁷ *ibid* p.173

1.2 THE DEFENCE OF IRRESISTIBLE IMPULSE

The defence of irresistible impulse will mean little or nothing to today's jurist. However, for over a century it was urged by both members of the medical and legal professions, both in England and Ireland, either as a replacement for or a supplement to the right-wrong test embodied in the McNaghten Rules. By examining this defence and its application, I will illustrate a facet of the dissatisfaction with the McNaghten Rules which pervaded medico-legal thinking in England until the late 1950's when the defence of diminished responsibility was introduced into English law.

Medical witnesses felt that there were many cases of insanity which McNaghten excluded but which would be covered by a defence of irresistible impulse. In England, for reasons which I deal with *below*, McNaghten finally emerged triumphant. In Ireland the defence of irresistible impulse, albeit in modified form, was eventually appended to the McNaghten Rules and forms part of a bipartite test of insanity. By a thorough discussion of those cases which featured the defence of irresistible impulse, I hope firstly, to set the scene for the defence as it exists in Irish law today. Secondly, with the help of those committees and debates which rejected irresistible impulse as a test of insanity, I will illustrate that it is not the solution to the defects contained in the McNaghten Rules.

The idea of irresistible impulses, arising from volitional or moral insanity, has its roots in the faculty psychology of Aristotle's time, which held that the mind was composed of localised independent faculties such as will, imagination and understanding⁶⁸, any one of which was liable to disease. In the course of the eighteenth century faculty psychology regained lost popularity as a result of the spread of the doctrine of phrenology⁶⁹, whose origin has been described *supra*⁷⁰.

⁶⁸ A.R.Hayward "Murder and Madness: *A Social History of the Insanity Defence in Mid-Victorian England*" M.Litt., (Oxford, 1983) p.32

⁶⁹ *ibid*

⁷⁰ See Section 1.2

The French psychiatrist Pinel's teachings that the reasoning faculties could remain intact during insanity, were taken up by James Cowles Prichard (1786-1848), the Bristol asylum superintendent, who by combining Pinel's *manie sans delire*⁷¹ and Esquirol's monomania, was responsible for "identifying" the eclectic category of moral insanity in 1833⁷². In this form of insanity, due to disease of the "moral" faculties, "the passions were under no restraint" and the will was surrendered impetuously to the emotions⁷³. In his article on *Soundness of Mind* (1835) Prichard argued that

"there is a form of insanity existing independent of any lesion of the intellectual powers, in which connected in some instances with evident constitutional disorder and with affections of the nervous system excited according to the well known laws of the animal economy, a sudden and often irresistible impulse is experienced to commit acts, which under a sane condition of mind would be accounted atrocious crime"⁷⁴.

Five years later Prichard was less convinced that irresistible impulse was a form of moral insanity⁷⁵. In *The Different Forms of Insanity in Relation to Jurisprudence*, published in 1842, he said "Instinctive madness seems to be rather an affection of the will or voluntary powers than of affections", describing it in the following terms:

"In this disorder the will is occasionally under the influence of an impulse, which suddenly drives the person affected to the perpetration of acts of the most revolting kind, to the commission of which he has

⁷¹ translated by N.Walker *Crime and Insanity* Vol.2 (Edinburgh, 1973) p.207 as "mania without confusion"

⁷² A.R.Hayward op cit p.73

⁷³ ibid p.77

⁷⁴ Quoted ibid p.89

⁷⁵ ibid

no motive. The impulse is accompanied by consciousness but it is in some instances irresistible"⁷⁶.

Although the identification of moral insanity may be attributed to Prichard, it appears that Etienne Georget (1795-1828), a disciple of the French psychiatrist Esquirol, was responsible for the "discovery" of volitional insanity⁷⁷. In a series of pamphlets he identified the condition of *monomania instinctive*⁷⁸. Georget proclaimed that murderers were insane even though they showed no signs of intellectual disturbance⁷⁹. He acknowledged that they reasoned perfectly well and were even morally repelled by their deeds, but maintained that the murderers had been propelled by an irresistible urge, committing crimes with full knowledge of their horror⁸⁰. This he attributed to a "lesion of the will" which left the rational faculties intact and moral discernment unimpaired⁸¹. In this respect volitional insanity differed from moral insanity where the moral faculties were impaired. However as Smith notes⁸² "[i]mpulsive insanity and moral insanity were rarely thought to exist in a pure form; rather, they were two overlapping classes. In the former, the dominant feature was uncontrollable, motiveless, sharp and spasmodic violence; in the latter, it was disordered emotion leading to general violence and aggressiveness".

With a climate favourable to the reception of psychological theories reconcilable with phrenology, Prichard's moral and instinctive insanity were readily accepted in English medical circles⁸³, as is evidenced by the plethora of cases *below*, where these conditions were offered as evidence of insanity. However the concept of moral insanity did not gain widespread lay and legal notice until the trial of Edward Oxford in 1840 for treason, for the attempted murder of Queen Victoria⁸⁴. Lord Denman C.J. directed the jury that

⁷⁶ Quoted by R.Smith op cit p.39

⁷⁷ R.Harris *Murders and Madness: Medicine Law and Society in the Fin de Siecle* (Oxford, 1989) pp.8 & 9

⁷⁸ ibid

⁷⁹ ibid p.9

⁸⁰ ibid

⁸¹ ibid

⁸² R.Smith op cit p.97

⁸³ A.R.Hayward op cit p.95

⁸⁴ ibid p.106

"If some controlling disease was, in truth, the acting power within [the defendant] which he could not resist, then he will not be responsible"⁸⁵.

When **McNaghten** was tried for the murder of Drummond, defence counsel Cockburn argued that the accused was the "creature of delusion, and the victim of ungovernable impulses, which wholly [took] away from him the character of a reasonable and responsible being"⁸⁶.

Drawing on the medical theories of the day Cockburn continued:

"the mistake existing in ancient times, which the light of modern science has dispelled, lay in supposing that in order that a man should be mad..it was necessary that he should exhibit those symptoms which would amount to total prostration of the intellect; whereas modern science has incontrovertibly established that any one of these intellectual and moral functions of the mind may be subject to separate diseases, and thereby man may be rendered the victim of the most fearful delusions, the slave of uncontrollable impulses impelling or rather compelling him to the commission of acts such as that which has given rise to the case now under your consideration"⁸⁷.

After an array of medical experts had testified in these terms Tindal C.J. stopped the trial. Although Tindal C.J. instructed the jury that the relevant question for their consideration was whether at the time of the crime McNaghten knew right from wrong in relation to the act, he left no doubt in their minds that he was entirely convinced by the uncontradicted medical evidence.

A moral panic ensued as a result of McNaghten's acquittal which was interpreted as "a precedent for every lunatic to take the law into his or her own

⁸⁵ *R v Oxford* 9 C.& P.525 p.546

⁸⁶ *R v McNaghten* 4 St.Tr.N.S.847 p.875

⁸⁷ *ibid* p.887

hands"⁸⁸. As a result the judges of England were asked to clarify the law's position on insanity. In their reply, no mention was made of the test used in Oxford, but this is undoubtedly attributable to the fact that their answers were confined to the questions put to them regarding persons who suffered from delusion. The Rules were no more than a set of answers to specific questions and were not intended as a general statement of the law⁸⁹. This is evident from statements of Tindal C.J. to the effect that

"they deemed it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute application of the principles involved in the Answers"⁹⁰.

and his caution that the Rules "should be accompanied by such observations and explanations as the circumstances of each particular case may require"⁹¹.

It was not long, however, before they had evolved into an inflexible yardstick of legal insanity and as a result in 1848 a plea of irresistible impulse was swiftly dismissed in Reg v Stokes⁹², Baron Rolfe stating that

"it is true that learned speculators, in their writings, have laid it down that men with a consciousness that they were doing wrong were irresistibly impelled to commit some unlawful act. Who enabled them to dive into the human heart and see the real motive that prompted the commission of such deeds".

In R v Barton⁹³ Baron Parke approved Baron Rolfe's view and noted that

"the excuse of an irresistible impulse co-existing with the full possession of reasoning powers, might be urged in justification of

⁸⁸ A.R.Hayward op cit p.108

⁸⁹ ibid p.109

⁹⁰ 10 CL.& F.200 p.208

⁹¹ ibid p.211

⁹² A.R.Hayward op cit p.113

⁹³ (1848) 3 Cox C.C.275

every crime known to the law - for every man might be said, and truly, not to commit any crime except under the influence of some irresistible impulse. Something more than this was necessary to justify an acquittal on the ground of insanity and it would be therefore for the jury to say whether..the impulse under which the prisoner had committed the deed was one which altogether deprived him of the knowledge that he was doing wrong. Could he distinguish between right and wrong?"⁹⁴.

Smith has uncovered some unreported cases in the medical literature of the day, where medical evidence of an irresistible impulse led to a successful defence of insanity. When Mary Ann Brough was tried for the murder of her six children in June 1854, medical opinion at her trial argued that there was a general syndrome in which brain disease led to an inability to control movements and classified Mrs Brough as belonging to this group. Mrs Brough was acquitted by reason of insanity⁹⁵. At the trial of Martha Prior in 1848 for the murder of her baby, although Lord Denman attacked the notion of irresistible impulse, he nevertheless conceded the jury would act on the medical testimony in order to acquit her⁹⁶ and in 1862 Dr Hood from Bethlem successfully argued that disease had led to uncontrollable conduct at the trial of Mrs Vyse for the murder of her two children⁹⁷. Smith opines⁹⁸ that in Mrs Brough's case it was the extreme and exceptional nature of the crime coupled with awe and humanitarian sentiment towards a mother who had killed her children which led to the acquittal, rather than deference to the medical viewpoint. It is worth noting at this point that women at this time were viewed as mentally weaker than men, especially in matters connected with reproduction⁹⁹, and therefore more prone to insanity - a view which no doubt influenced the introduction of the partial defence of infanticide in

⁹⁴ ibid p.276

⁹⁵ R.Smith "The Boundary Between Insanity and Criminal Responsibility in Nineteenth Century England" in A.Scull (ed) *Madhouses, Maddoctors and Madmen* (Philadelphia, 1981) pp.372 & 373

⁹⁶ R.Smith *Trial by Medicine* op cit p.109

⁹⁷ ibid p.112

⁹⁸ R.Smith "The Boundary Between Insanity and Criminal Responsibility in Nineteenth Century England" op cit p.373

⁹⁹ R.Smith *Trial by Medicine* op cit pp.143 and 144

(For further insight on medical views of women and sexuality during this era see E.Showalter "Victorian Women and Insanity" (1980) 23 Victorian Studies 157 pp.169-171 and V.Bullough and M.Voigt "Women, Menstruation, and Nineteenth-Century Medicine" (1973) 47 Bull.Hist.Med.pp.66-82)

1922. Hence the success of Martha Brixey in an insanity plea in 1845, where the defence argued that obstructed menstruation led to an irresistible impulse to murder (there was no evidence of delusion or intellectual aberration)¹⁰⁰. Disordered menstruation ("amenorrhoea") was the reason for Shepherd's acquittal for stealing a fur boa and for the acquittal of Amelia Snoswell for killing her baby niece¹⁰¹, but whether evidence of uncontrollable impulses was tendered here is uncertain.

At the trial of James Hill in 1856 for cutting off his nephew's head Willes J. asserted that

"such a thing as a person not being able to control himself in the doing of an act which he knows to be wrong, is a phrase that is not known to the law of this country"

but he finally compromised by inferring that as the question was the consciousness of right and wrong at the moment of the deed, consciousness might have been swept aside by the actual impulse¹⁰².

However each successful plea was matched by more cases where irresistible impulse was rejected. John Smith was hanged in 1849 following Lord Denman's direction to the jury to ignore the defence¹⁰³. In Alnutt the plea was unsuccessful at the trial of a twelve-year-old boy who poisoned his grandfather¹⁰⁴. At the trial of Robert Pate in July 1850 for hitting Queen Victoria on the head with his walking stick, Baron Alderson asserted that if a man claimed that he picked a pocket from some uncontrollable impulse, the law would have an uncontrollable impulse to punish him for it¹⁰⁵. The failure of the defence in Buranelli's and Dove's cases are further illustrations of the law's antagonism to the medical theories of the day.

¹⁰⁰ Described by R.Smith ibid pp.155 & 156

¹⁰¹ Both of these cases are described by R.Smith ibid p.156

¹⁰² ibid p.111

¹⁰³ ibid p.109

¹⁰⁴ ibid

¹⁰⁵ ibid p.126

There were a number of reasons for the Judiciary's opposition to an insanity defence which considered irresistible impulse. A utilitarian theory of punishment prevailed which favoured deterrence and retribution¹⁰⁶ and the above-named medical entities proposed to excuse not only the mad but the bad in pursuit of reformation. As Prichard himself noted of moral insanity "there is scarcely an act in the catalogue of human crimes which has not been imitated..by this disease"¹⁰⁷. Further, there was no evidence that medicine could in fact cure these "illnesses"¹⁰⁸. The difficulty of identifying accurately who would be affected by the threat of sanction led to a preference for McNaghten over the irresistible impulse test¹⁰⁹. With judges and prosecuting counsel seeing themselves as delegates of public morality and "society's guardians"¹¹⁰ it was felt that errors should be made in the direction of more sanction rather than less¹¹¹.

There were also competing professional and status claims involved in the conflict¹¹². The medical profession was attempting to advance itself within the realm of the criminal law but encountered great difficulty. Judiciary and counsel had unquestionable professional autonomy compared with the alienists' questionable social authority¹¹³.

It was a frequent criticism of the medical argument for a re-phrasing of the Rules to include irresistible impulse, that logical consistency meant that alienists were invoking the determinism of all human actions¹¹⁴. Deterministic theories threatened to undermine the law's traditional *modus operandi*, based on the theory of free will¹¹⁵. Because the law's approach to miscreants was entrenched it appeared natural and self evident¹¹⁶.

¹⁰⁶ ibid pp.73 & 74

¹⁰⁷ Quoted by R.Smith ibid p.39

¹⁰⁸ A.Goldstein op cit p.21

¹⁰⁹ ibid p.211

¹¹⁰ R.Smith *Trial by Medicine* op cit p.75

¹¹¹ A.Goldstein op cit p.21

¹¹² See A.R. Hayward op cit, generally.

¹¹³ R.Smith *Trial by Medicine* op cit p.67

¹¹⁴ R.Smith "The Boundary Between Insanity and Criminal Responsibility in Nineteenth Century England" op cit p.375

¹¹⁵ F.McAuley "The Civilian Experience of the Insanity Defence" (1989) 24 Ir.Jur.227 p.235

¹¹⁶ R.Smith *Trial by Medicine* op cit p.67

Finally, the notion of defective will power was unlikely to gain credence in Victorian Society where will power and restraint were values which were cherished¹¹⁷.

Hence in R v Haynes¹¹⁸, Baron Bramwell gave the notion short shrift telling the jury:

"If the influence itself be held a legal excuse rendering the crime disipunishable you at once withdraw a most powerful restraint - [law] forbidding and punishing its perpetration"¹¹⁹.

This observation reveals Baron Bramwell's distrust of the genuineness of truly irresistible impulses. In similar vein, Wightman J. observed that moral insanity was

"a most dangerous doctrine and fatal to the interests of society and security of life"¹²⁰.

He went on to hold that the notion was inconsistent with the rule laid down by the judges, namely that a man was responsible for his actions if he knew the difference between right and wrong.

By now the notion of irresistible impulse had gained widespread approval in medical circles. The discovery of reflex action of the cerebrum and spinal cord and increasing knowledge of the effects of epilepsy, whilst exposing the crudity of phrenology¹²¹, nevertheless bolstered the medical argument that there were uncontrollable movements which the law should recognize. In July 1864 the Association of Medical Officers of Hospitals and Asylums for the Insane passed a resolution to the effect

¹¹⁷ ibid p.72

¹¹⁸ (1859) 1 F.& F.666

¹¹⁹ ibid p.667

¹²⁰ *R v Burton* (1863) 3 F.& F.772 p.780

¹²¹ A.R.Hayward op cit p.49

"That so much of the legal test of the medical condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions"¹²².

The wording of the motion seems to suggest that some insane persons should be excused because their delusions led to uncontrollable impulses.¹²³

This resolution was moved by Dr. Harrington Tuke who also gave evidence to the Royal Commission on Capital Punishment in 1865¹²⁴. However, he stipulated in his evidence before the Commission that irresistible impulse should not be a defence in the case of a sane man and that he would require evidence of his insanity, except where the killing was without possible motive. This approach shows a willingness to deduce insanity from an ostensibly insane *act* without reference to the accused's state of mind, an approach which was utterly at odds with the law's emphasis on states of mind. If medical experts habitually took this approach then it is no wonder that the legal profession was opposed to a defence of irresistible impulse which could be only too easily inferred from the perpetration of a criminal act. Mr William Tallack also quoted the above resolution in his evidence before the Royal Commission¹²⁵.

The Royal Commission in its report declined to make any recommendation on the law of insanity on the ground that this issue was not confined to capital cases but affected the entire administration of criminal law. It did, however, recommend further investigation of this area of law¹²⁶.

¹²² N.Walker *Crime and Insanity in England* Vol.1 op cit pp.105 and 106

¹²³ ibid p.106

¹²⁴ Report of the Royal Commission on Capital Punishment (1949-53) op cit appendix 8 (d) p.398

¹²⁵ Report and Minutes of Evidence before the Royal Commission on Capital Punishment 1864-6 in B.P.P.1866, xxi at pp.xxviii and xxix

¹²⁶ ibid p.li

The most relentless judicial advocate of irresistible impulse was Sir James Fitzjames Stephen (1829-94). In a paper to the Juridical Society in 1855 he appeared wary of the notion of irresistible impulse, saying¹²⁷:

"There may have been many instances of irresistible impulse of this kind, although I fear there is a disposition to confound them with unresisted impulses".

At this point in time his view was that "if the prisoner is to be acquitted, it must be because the impulse is irresistible, because the act is not wilful..the guilt turns upon the wilfulness of the act, and not upon the sanity of the prisoner"¹²⁸. No doubt this approach was influenced by his reluctance to see any increase in the numbers acquitted by reason of insanity.

The same view pervaded his *General View of the Criminal Law of England*¹²⁹ where he said

"The great object of the criminal law is to induce people to control their impulses, and there is no reason why, if they can, they should not control insane impulses as well as sane ones"¹³⁰.

Stephen was of the opinion that the commonest and strongest cases were those of women who, without motive or concealment, killed their children after recovery from childbirth¹³¹. With regard to moral insanity, his view was that if proved, it would be a ground for acquitting the accused on the ground of lack of malice¹³². However, he stated

¹²⁷ On the policy of maintaining the limits at present imposed by law on the criminal responsibility of madmen - Papers read before the Juridical Society, 1855-8 (London, 1855) p.81

¹²⁸ ibid

¹²⁹ A *General View of the Criminal Law of England* (London, 1863)

¹³⁰ ibid p.95

¹³¹ ibid

¹³² ibid

"The evidence given in support of the assertion that a man is "morally insane" is, generally speaking, at least as consistent with the theory that he was a great fool and a great rogue, as with the theory that he was the subject of a special disease, the existence of which is doubtful"¹³³.

By the 1870's Stephen had altered his stance. In 1872 Stephen prepared a draft of a Homicide Law Amendment Bill to codify the law relating to homicide¹³⁴. When this was referred to a Select Committee in 1874 the provision on insanity had been amended slightly to provide

"24. Homicide is not criminal, if the person by whom it is committed is, at the time when he commits it, prevented by any disease affecting his mind -
(a) from knowing the nature of the act done by him;
(b) from knowing that it is forbidden by law;
(c) from knowing that it is morally wrong; or,
(d) from controlling his own conduct.

But homicide is criminal, although the mind of the person committing it is affected by disease, if such disease does not in fact produce some one of the effects aforesaid in reference to the act by which death is caused, or if the inability to control his conduct is not produced exclusively by such disease.

If a person is proved to have been labouring under any insane delusion at the time when he committed homicide it shall be presumed, unless the contrary appears or is proved, that he did not possess the degree of knowledge or self-control hereinbefore specified"¹³⁵.

What is noteworthy is the emphasis on mental disease rather than on lack of will which marked his earlier discussions on the subject. Lord Chief Justice Cockburn

¹³³ ibid pp.95 & 96

¹³⁴ B.P.P., 1872, Vol.2 p.241

¹³⁵ B.P.P., 1874, Vol.2 p.370

was opposed to the provision on delusion but expressed his approval of Stephen's main proposal, saying

"I most cordially concur in the proposed alteration of the law, having always been strongly of the opinion that, as the pathology of insanity abundantly establishes, there are forms of mental disease in which, though the patient is quite aware he is about to do wrong, the will becomes overpowered by the force of irresistible impulse; the power of self-control, when destroyed, or suspended by mental disease, becomes, I think, an essential element of responsibility"¹³⁶.

However the other witnesses were opposed to the provision on irresistible impulse, Mr. Justice Blackburn on the ground that it would exclude cases which ought to be included¹³⁷ and Baron Bramwell on the ground that it would weaken the deterrent value of the criminal law. His view on the subject was summed up in the following statement

"It is obvious that what is called an uncontrollable impulse is one as to which the deterring or controlling motives are not strong enough; and this is a proposition in all cases to take away from a man in a state of mind in which he is more likely to do mischief than anything else, a deterring motive"¹³⁸.

However his approach to mothers who killed their children under an irresistible impulse was in marked contrast to the above. Of these he stated

"Surely such a case as this is a case of misfortune and not of crime..The act is a spasmodic one, like a cough or winking of the eye. It gives a man no practical pleasure to cough or wink, but if you

¹³⁶ B.P.P., 1874, Vol. ix p.549

¹³⁷ ibid p.527

¹³⁸ ibid p.513

threatened to fay him alive for it he would not be able to abstain for any length of time"¹³⁹.

Baron Bramwell was also opposed to the presumption proposed in cases of delusion. In any event, the Select Committee decided not to proceed with partial codification¹⁴⁰.

In 1878 Stephen included a provision on similar lines in the Draft Criminal Code Bill. However, in a deliberate attempt to placate the Bramwellian opposition¹⁴¹ he provided

"No act shall be an offence if the person who does it is at the time when it is done prevented, either by defective mental power or by any disease affecting his mind,

- (a) from knowing the nature of his act; or
- (b) from knowing either that the act is forbidden by law or that it is morally wrong; or
- (c) if such person was at the time when the act was done, by reason of any such cause as aforesaid, in such a state that he would not have been prevented from doing that act by knowing that if he did do it the greatest punishment permitted by law for such an offence would be instantly inflicted upon him, provided that this provision shall not apply to any person in whom such a state has been produced by his own default"¹⁴².

Nonetheless the Commission was of the view that

"The test proposed for distinguishing between such a state of mind and a criminal motive, the offspring of revenge, hatred or ungoverned passion, appears to us on the whole not to be practicable or safe, and we are unable to suggest one which would satisfy these requisites and

¹³⁹ ibid p.514

¹⁴⁰ ibid pp.iii and iv

¹⁴¹ S.Davies "Irresistible Impulse in English Law" (1930) 17 Can.B.R.147 p.159

¹⁴² B.P.P.,1878, Vol.2 p.31

obviate the risk of a jury being misled by considerations of so metaphysical a character"¹⁴³.

By 1879 the revised form of the Code showed that the orthodox view had prevailed over that of Stephen¹⁴⁴. By the time he wrote *A History of the Criminal Law of England*¹⁴⁵ Stephen was casting doubt on the authority of the McNaghten Rules¹⁴⁶. As to the status of irresistible impulse as a criminal law defence he asserted

"the proposition that the effect of disease upon the emotions and the will can never under any circumstances affect the criminality of the acts of persons so afflicted is so surprising and would, if strictly enforced, have such monstrous consequences, that something more than an implied assertion of it seems necessary before it is admitted to be part of the law of England"¹⁴⁷.

He even opined that in cases of insanity judges might rightly feel themselves at liberty to direct the jury in such terms as they felt appropriate¹⁴⁸ in other words, to ignore the Rules. Although he continued to require that an impulse be irresistible¹⁴⁹ he was of the view that a man who by reason of mental disease was prevented from controlling his conduct was in any event covered by the McNaghten Rules¹⁵⁰. This is because of the broad interpretation which he ascribed to knowledge within the Rules, saying

"Knowledge has its degrees like everything else and implies something more real and more closely connected with conduct than the half knowledge retained in dreams"¹⁵¹.

¹⁴³ B.P.P., 1878-9, Vol.20 p.186

¹⁴⁴ S.Davis op cit p.159

¹⁴⁵ *A History of the Criminal Law of England* Vol.ii op cit

¹⁴⁶ ibid pp.153 & 154

¹⁴⁷ ibid p.159

¹⁴⁸ ibid pp.154 & 155

¹⁴⁹ ibid p.172

¹⁵⁰ ibid p.167

¹⁵¹ ibid p.166

A requirement of a deeper level of knowledge would cover cases of irresistible impulse. According to Stephen knowledge and self-control were inter-dependent:

"It is as true that a man who cannot control himself does not know the nature of his acts as that a man who does not know the nature of his acts is incapable of self-control"¹⁵².

In R v Davis (1881)¹⁵³ Stephen took the initiative himself. Two medical men gave evidence that the accused, who was charged with feloniously wounding his sister-in-law with intent to murder her, was suffering from *delirium tremens*, as a result of which his actions would not be under his control and he would not be able to distinguish between moral right and wrong at the time he committed the act.

Stephen's summing-up had all the appearance of orthodoxy, for he told the jury that they must follow "the great test laid down in McNaughten's case" but then he did his best to show the dependence of knowledge of right and wrong on possession of self control:

"As I understand the law, any disease which so disturbs the mind that you cannot think calmly and rationally of all the different reasons to which we refer in considering the rightness or wrongness of an action - any disease which so disturbs the mind that you cannot perform that duty with some moderate degree of calmness and reason may be fairly said to prevent a man from knowing that what he did was wrong... both the doctors agree that the prisoner was unable to control his conduct, and that nothing short of actual physical restraint would have deterred him from the commission of the act. If you think there was a distinct disease caused by drinking, but differing from drunkenness, and that by

¹⁵² ibid p.171

¹⁵³ (1881) 14 Cox.C.C.563

reason thereof he did not know that the act was wrong, you will find a verdict of not guilty on the ground of insanity"¹⁵⁴.

The jury returned a verdict of not guilty on the ground of insanity.

Stephen J. again used irresistible impulse as evidence of lack of knowledge of right and wrong in R v Burt (1885) and R v Davies (1888)¹⁵⁵

Soon other judges were going a step further than Stephen J. In R v Duncan (1890) Lawrence J. added, as an alternative to the usual charge, the question:

"Was the prisoner unable to control his actions in consequence of a disordered mind?"¹⁵⁶.

In Jordan (1872) Baron Martin had said "When such impulses come upon men, according to the medical view they were unable to resist them. It would be safe in such a case to acquit the accused on the ground of insanity"¹⁵⁷. The defence was again admitted in Gill (1883)¹⁵⁸.

In 1910 the Court of Criminal Appeal had its first opportunity to settle the issue in the case of Victor Jones¹⁵⁹. The accused was convicted of the murder of a schoolteacher friend before Grantham J., at the Monmouth Assizes. He appealed *inter alia* on the ground of misdirection as to the law relating to insanity as a defence. Counsel for the appellant contended that his crime showed all the characteristics which Taylor and other writers on medical jurisprudence recognised as notes of homicidal mania or impulsive insanity namely,

- 1) no motive

¹⁵⁴ ibid p.564

¹⁵⁵ These cases were cited by the Royal Commission on Capital Punishment (1949-53) Cmd 8932 op cit appendix 8(d) p.400

¹⁵⁶ The Law Times (1960) Vol.229 p.192

¹⁵⁷ H.Barnes op cit p.316

¹⁵⁸ ibid

¹⁵⁹ (1910) 4 Cr.App.R.207

- 2) the victim an object of sincere love
- 3) no concealment
- 4) no attempt to escape
- 5) confession of the act
- 6) outward appearance of utter coolness and indifference.

Defence counsel contended that even if these facts were not of themselves sufficient to show insanity, taken together with the appellants mental history, they were of great moment. Arguing that knowledge and self control are interdependent he drew support from Stephen's *History of the Criminal Law of England*¹⁶⁰ and from Baron Rolfe's *dictum* in Layton¹⁶¹, in justification of his argument that, "knowing" that an act is right or wrong requires something more than mere consciousness.

That the Court of Appeal was not satisfied that either McNaghten madness or irresistible impulse had properly been made out is evident from the words of Alverstone L.C.J.:

"There is no need here to enter upon a disquisition as to the terms in which the question ought to be left, where a person is prevented by defective mental power or mental disease from knowing the nature of his acts or from controlling his conduct. It is not made out in this case that the appellant was not in a condition to be aware of the nature of his acts or that he was prevented from exercising self control"¹⁶².

The Court of Appeal decided to postpone determination of the issue for an occasion when the facts established uncontrollable impulse. Alverstone L.C.J. asserted that

¹⁶⁰ Stephen *A History of the Criminal Law of England* Vol.ii op cit

¹⁶¹ (1849) 4 Cox.C.C 155

¹⁶² (1910) 4 Cr.App.R.207 p.217

"when that day comes the Court will not shrink from the duty of deciding those matters of controversy and declaring the law. But in this case they do not arise"¹⁶³.

The plea of irresistible impulse enjoyed success for some time after the trial of **Victor Jones**. In R v Hay¹⁶⁴ Darling J. directed a jury that they would be justified in finding the accused insane, if through disease of the mind he was unable to control a homicidal impulse, although he knew the nature and quality of his act and knew that it was wrong.

That same year the Court of Criminal Appeal was required to consider an uncontrollable impulse in R v Thomas¹⁶⁵. Thomas was convicted of murder and appealed on the ground that the trial judge erred in not allowing irresistible impulse to go to the jury. Darling J., now sitting in the Court of Criminal Appeal, found that the trial judge's direction was perfectly adequate in light of the evidence and that "Impulsive insanity is the last refuge of a hopeless defence"¹⁶⁶.

It is submitted that this ruling cannot be taken as a rejection of irresistible impulse by the Court of Criminal Appeal. The Court was merely urging for caution where uncontrollable impulse was pleaded.

In the face of the Court of Appeal's indecision, trial judges continued to give approval to the doctrine of irresistible impulse. In R v Fryer¹⁶⁷, where medical witnesses offered conflicting evidence as to the accused's insanity, Bray J. (referring to the McNaghten rules) directed the jury in the following terms

"That is the recognised law on the subject but I am bound to say it does not seem to me to completely state the law as it now is and for the

¹⁶³ ibid p.218

¹⁶⁴ 22 Cox.C.C.268

¹⁶⁵ (1911) 7 Cr.App.R.36

¹⁶⁶ ibid p.37

¹⁶⁷ (1915) 24 Cox.C.C.403

purposes of to-day I am going to direct you in the way indicated by a very learned judge, Fitzjames Stephen and follow his direction, that, if it is shown that he is in such a state of mental disease or natural mental infirmity as to deprive him of the capacity to control his actions I think you ought to find him what the law calls him - 'insane'¹⁶⁸.

Not long after, Bray J. directed a jury in similar terms, where a plea of guilty but insane was based on evidence that the prisoner was an epileptic and had acted under the influence of an uncontrollable impulse¹⁶⁹. This time, however, he qualified the defence of irresistible impulse with the requirement that the accused be deprived, at the time, of *all* control over his actions.

In R v Coelho¹⁷⁰ the Court of Appeal refused to set aside a conviction for murder on the ground that the trial judge should have allowed a defence of irresistible impulse to go to the jury. Again the decision seems to have been based on lack of evidence of the condition as nothing in the judgment suggests a rejection of irresistible impulse *per se*.

However, resistance to recognition of irresistible impulse as a defence reasserted itself and in R v Holt¹⁷¹ the Court of Appeal put an end to the notion. The question of whether the accused was suddenly overcome by an uncontrollable impulse was left to the jury by the trial judge (Greer J.) but they decided against the appellant. On appeal, the Court of Appeal (Reading L.J. speaking on behalf of Avory J. and surprisingly Bray J., who had presided over R v Fryer and R v Jolly) held that

"The tests in McNaughten's case must be observed, and it is not enough for a medical expert to come to the Court and say generally that in his opinion the criminal is insane"¹⁷².

¹⁶⁸ ibid p.405

¹⁶⁹ R v Jolly 83 J.P.296

¹⁷⁰ (1914) 10 Cr.App.R.210

¹⁷¹ (1921) 15 Cr.App.R.10

¹⁷² ibid p.12

Soon afterwards Darling J., hearing an appeal against a conviction for murder, held

"The contention..that the prisoner was insane was based upon grounds never yet admitted in any English Court of Justice"¹⁷³.

This is a surprising observation considering that he himself had accepted these grounds as evidence of insanity in R v Hay. He continued:

"We are satisfied that the learned judge...gave the correct definition of the kind of insanity, according to law, which would have justified a special verdict and pointed out that if the question of uncontrollable impulse had to be considered there was no evidence that the prisoner was under an uncontrollable impulse, because every fact went to shew premeditation"¹⁷⁴.

Despite the Court of Appeal's recent pronouncements, in True 1922¹⁷⁵ the trial judge, McCardie J., allowed a defence of irresistible impulse to go to the jury but they rejected it. On appeal the Court of Appeal reasserted the supremacy of the McNaghten Rules, saying:

"there is no foundation for the suggestion that the rule derived from McNaghten's case has been in any sense relaxed"¹⁷⁶.

Furthermore Greer J. denied that in Holt he had directed the jury that irresistible impulse was a defence. He stated:

¹⁷³ *R v Quaraby* (1921) 15 Cr.App.R.163 p.164

¹⁷⁴ *ibid*

¹⁷⁵ *R v True* (1922) 16 Cr.App.R.164

¹⁷⁶ *ibid* p.170

"What I really told the jury was that the definition of insanity in criminal cases was the one laid down by the judges in McNaghten's case but that men's minds were not divided into separate compartments, and that if a man's will power was destroyed by mental disease it might well be that the disease would so affect his mental powers as to destroy his power of knowing what he was doing or knowing that it was wrong. 'Uncontrollable impulse' in this event would bring the case within the rule laid down in McNaghten's case"¹⁷⁷.

The medical tests prevailed when True was reprieved by the Home Secretary on the grounds of his mental condition. (To secure a reprieve a medical report by two doctors was necessary, which in this instance the Home Secretary treated as conclusive evidence of True's insanity). As a result of this, the Home Secretary came under an onslaught of criticism¹⁷⁸. However, the controversy generated by this reprieve did have the effect of bringing into the open the tension between the law's definition of insanity (i.e. McNaghten) and the medical theories of the day¹⁷⁹. The outcome of all this was the appointment by the Government of a Committee on Insanity and Crime "to consider what changes, if any, are desirable in the existing law and practice relating to criminal trials in which the plea of insanity as a defence is raised, and whether any and, if so, what changes should be made in the existing law and practice in respect of cases falling within the provisions of section 2(4) of the Criminal Lunatics Act, 1884"¹⁸⁰ (the section dealing with psychiatric inquiries instituted after sentence by the Home Secretary).

The Committee was chaired by Lord Justice Atkin and its members were appointed by the Lord Chancellor, the Earl of Birkenhead. Its composition was overwhelmingly legal (the only non-legal members were the permanent head of the Home Office and one of his senior subordinates)¹⁸¹. It contained the two civil servants

¹⁷⁷ ibid p.167

¹⁷⁸ H.C.Deb.1922, Vol.155 p.201

¹⁷⁹ Cf: ibid p.2421

¹⁸⁰ Report of the Committee on Insanity and Crime Cmd 2005 (London, 1924) p.787

¹⁸¹ N.Walker *Crime and Insanity in England* Vol.1 op cit p.108.

mentioned, the Attorney-General, the Solicitor General, Senior Treasury Counsel, the Director of Public Prosecutions, Sir Herbert Stephen (a Clerk of Assize) and Lord Atkin (a Lord Justice of appeal). By subsequent correspondence it was made clear that the Lord Chancellor intended the inquiry to have a wide scope and to include consideration of the Rules in McNaghten's case¹⁸². The Committee on Insanity and Crime (Atkin Committee) received memoranda from both the British Medical Association and the Medico Psychological Association.

In composition the Committee was not only overwhelmingly legal but was official to an extent that could be considered quite improper¹⁸³. It is clear that by appointing such a legally representative body of members the Lord Chancellor was doing his best to ensure that their report would preserve the *status quo*.¹⁸⁴. Surprisingly however, the Atkin Committee favoured the British Medical Association's proposal to add the defence of irresistible impulse to the McNaghten Rules. The report of the British Medical Association proposed that a person should be held to be irresponsible, if prevented by mental disease "from controlling his own conduct unless the absence of control is the direct and immediate consequence of his own default"¹⁸⁵.

The Committee felt that the exception as to direct consequence of his own default was superfluous as the only case suggested was the taking of drink or drugs as an incentive to do the act, which would presumably show that loss of control was not caused by mental disease¹⁸⁶. The British Medical Association's witnesses had proposed that *complete* loss of control caused by mental disease would be necessary and the Committee preferred loss of control with reference to the act charged than general loss of control¹⁸⁷. It noted that general lack of control would be relevant to the question whether the lack of control in the particular case was due to mental disorder or to a mere vicious propensity¹⁸⁸.

¹⁸² Report of the Committee on Insanity and Crime Cmd 2005 op cit.p.3

¹⁸³ N.Walker *Crime and Insanity in England* Vol.1 op cit p.108

¹⁸⁴ ibid p.109

¹⁸⁵ Report of the Committee on Insanity and Crime Cmd 2005 op cit p.9

¹⁸⁶ ibid p.8

¹⁸⁷ ibid p.9

¹⁸⁸ ibid

Finally, the Committee, pointing to the body of conflicting case law, advised clarification of the law by an express statutory provision introducing irresistible impulse as a defence¹⁸⁹. The Atkin Committee was most convinced by the genuineness of irresistible impulses in the case of "mothers who have been seized with the impulse to cut the throats or otherwise destroy their children to whom they were normally devoted" and who in practice were found insane¹⁹⁰. This was the only example which they gave in support of their argument for an insanity defence accommodating irresistible impulse.

On 6/3/1924 the Home Secretary made it clear that the Government did not contemplate proposing any legislation on this subject¹⁹¹, possibly because of the introduction of infanticide as a partial defence in 1922. To some, no doubt, this rendered the Atkin Committee's recommendation otiose. As a result of the Government's inertia Lord Darling introduced a private members bill in 1924, the Criminal Responsibility (Trials) Bill, designed to give effect to these recommendations.¹⁹²

Clause One of this bill enacted in statutory form the existing McNaghten Rules, with the proposed addition as to uncontrollable impulse. The House of Lords refused to give the bill a second reading after a debate in which it was opposed by Lord Sumner, the Lord Chief Justice (Lord Hewart) - who said that he had consulted 12 of the 15 judges of the King's Bench Division and 10, like himself, emphatically opposed the bill - the Lord Chancellor (Lord Haldane), Lord Dunedin and Lord Cave¹⁹³.

¹⁸⁹ ibid

¹⁹⁰ ibid p.8

¹⁹¹ H.C.Deb.1924, Vol.170 p.1576

¹⁹² See the debate on the Criminal Responsibility (Trials) Bill H.L.Deb.1924, Vol.57 p.443

¹⁹³ Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 op cit appendix 8 (d) p.405

The arguments on which the opposition to the bill was founded have been summarised briefly by the Royal Commission on Capital Punishment (1949-53) as follows¹⁹⁴:-

- 1) Even if it were accepted that there was such a thing as an irresistible impulse, cases were uncommon and could be satisfactorily dealt with under the existing law. The McNaghten Rules were sufficiently flexible to allow a verdict of guilty but insane to be founded in those cases of irresistible impulse where it was justified.
- 2) There was no clear criterion by which to decide whether an impulse was irresistible or only unresisted, and the proposed addition to the McNaghten Rules would place juries in an impossible position, besides making it much more difficult for the judge to give an adequate direction to the jury.
- 3) In practice this defence would be most often raised when no other defence had any chance of success. Juries were apt to take a merciful view and would be reluctant to reject medical evidence that an impulse was irresistible. Thus, responsibility would, in effect, be transferred from the jury to the doctors, with the result that many offenders would escape just punishment.
- 4) The proposed change would apply to other crimes as well as murder and might lead to a serious increase in crimes of violence, especially in offences against women and children. Sane and insane persons alike were subject to such impulses as anger and sexual passion and there would be a great danger that sane persons who committed crimes under such impulses would successfully plead that the impulse was irresistible.
- 5) There was no justification for suggesting that everyone who was insane was wholly irresponsible for his actions. The penalties of the law were, in fact, a restraining influence on many persons of unsound mind and if this restraint were removed, many would yield to impulses which they would otherwise have resisted.

That much of the opposition to irresistible impulse was based on the law's fear of medical dominance in cases where insanity was pleaded is evident from a lecture

¹⁹⁴ ibid pp.405 & 406

delivered by Lord Hewart before the Medical Society of London where he said of the defence of irresistible impulse

"If the law were relaxed in the way which has been suggested..the result might be to transfer to a section of the medical profession the question whether a great number of ordinary criminals should be held responsible to the law"¹⁹⁵.

Any doubt as to the status of the defence of irresistible impulse was resolved by Kopsch (1925)¹⁹⁶. Kopsch had strangled his uncle's wife with his tie at her request. There Hewart L.C.J. categorically rejected irresistible impulse as a defence, saying:

"It is the fantastic theory of uncontrollable impulse which if it were to become part of our criminal law would be merely subversive. It is not yet part of the criminal law and it is to be hoped that the time is far distant when it will be made so"¹⁹⁷.

Flavell¹⁹⁸ was the last case in the series to reject the defence of irresistible impulse and Sodeman¹⁹⁹ marked the end of its life in the dominions.

In A.G. for South Australia v Brown²⁰⁰ the irresistible impulse issue arose again but this time from a different angle. Brown was found guilty of the murder of his employer Neville Lord. After the killing he made a statement to the police to the effect that he knew what he was doing was wrong but he couldn't help himself. At the trial, the medical witnesses agreed that Brown was a schizoid personality and was not suffering from any disease or disorder of the mind but differed with regard to whether Brown knew that his act was wrong.

¹⁹⁵ Excerpts of the lecture have been published by the Law Times (1927) Vol.164 p.384

¹⁹⁶ (1925) 19 Cr.App.R.50

¹⁹⁷ ibid pp.51 & 52

¹⁹⁸ (1926) 19 Cr.App.R.10

¹⁹⁹ [1936] 2 All.E.R.1138

²⁰⁰ [1960] 2 W.L.R.588

Although the issue of irresistible impulse was not raised by the defendant, the trial judge, Abbot J., asserted that it was no defence in law. Brown was found guilty of murder and sentenced to death and his appeal was dismissed by the Full Court of the Supreme Court of South Australia. He appealed to the High Court of Australia, which quashed the conviction and ordered a new trial.

The High Court held that the trial judge's reference to uncontrollable impulse was open to serious objection because irresistible impulse, as such, had not been raised as a defence. Nor had anyone suggested that it could amount to a defence. However, this did not mean that evidence concerning the prisoner's domination by an uncontrollable impulse was irrelevant because

"it may afford strong ground for the inference that a prisoner was labouring under such a defect of reason from disease of the mind as not to know that he was doing what was wrong".

Although at first sight the above words seem to refer to irresistible impulse evidencing *insanity within the McNaghten Rules*, on closer analysis it appears that the High Court was referring to uncontrollable impulse evidencing lack of *knowledge of the wrongness of an act*. Hence, the High Court of Australia was following the Stephen interpretation of "wrong" as denoting more than mere knowledge. If irresistible impulse would prevent the defendant from reasoning calmly about the moral character of the act he would be prevented from knowing that the act was wrong. It was the above statement by the High Court which the Privy Council objected to, restoring the verdict of the trial court. Lord Tucker's worry was that the above words

"would naturally be read as requiring [judges] to tell the jury *as a matter of law* and *in the absence of any medical evidence* (emphasis added) to the effect that irresistible impulse is a symptom of *some disorder of the mind*, which although not preventing the patient from

knowing the nature and quality of his act yet does prevent him from knowing that it is wrong"²⁰¹.

This is a peculiar interpretation of the High Court's judgment, and it is submitted that it is not the correct one. The High Court was not asserting that irresistible impulse might, in the absence of medical evidence, demonstrate the existence of a disease of the mind but rather, that it might evidence lack of knowledge of the wrongfulness of an act. The Privy Council noted that where evidence was given that irresistible impulse was a symptom of the particular disease of the mind from which the prisoner was allegedly suffering and as to its effect on his ability to know the nature and quality of his act or that his act was wrong, it would be the duty of the judge to deal with the matter in the same way as any other relevant evidence given at the trial²⁰².

In 1930 the report of the Select Committee on Capital Punishment²⁰³ stated:

"We are satisfied that there is a strong case for bringing the McNaghten Rules up to date, so as to give the fullest scope to general medical considerations and to extend in some way the area of criminal irresponsibility"²⁰⁴.

The Committee recommended, in the event that Parliament should decide to maintain the death penalty, that the McNaghten Rules be revised "so as to give further scope to general medical considerations, and to extend the area of criminal irresponsibility in the case of the mentally defective and of those who labour under some distinct form of insanity"²⁰⁵.

²⁰¹ ibid p.598

²⁰² ibid p.599

²⁰³ Report of the Select Committee on Capital Punishment (London, 1930)

²⁰⁴ ibid p.xi, para.161

²⁰⁵ ibid para.474

Once again no action was taken on their recommendation and when the Royal Commission on Capital Punishment of 1953 reported²⁰⁶, the Rules were unaltered from their form in 1843. The British Medical Association was still urging extension of the McNaghten Rules to cover irresistible impulse. Although the Association received express and implied support from a substantial number of witnesses²⁰⁷, the majority of witnesses felt that the Rules were by now being interpreted so loosely that cases of irresistible impulse caused by disease of the mind were now embraced by them.

Rejecting all the traditional arguments against adopting irresistible impulse as a defence, the Royal Commission felt that if anything, the addition of irresistible impulse would be too narrow a test of responsibility²⁰⁸, saying:

"If therefore, the McNaghten Rules are to be extended by the addition of a third limb to meet the case of insanity affecting not the reason but the will, it is important that this should be formulated not merely in terms of inability to resist an impulse, but in wider terms which will allow the court to take account of those cases where an insane person commits a crime after a long period of brooding and reflection or is gradually carried towards it without any real attempt to resist this tendency"²⁰⁹.

Although the Commission preferred that the jury be left free to determine whether, at the time of the act, the accused was suffering from disease of the mind or mental deficiency to such a degree that he ought not to be held responsible²¹⁰, it felt that the British Medical Association's proposal was preferable to leaving the McNaghten Rules intact²¹¹. The Commission recommended that a formula on the following lines should be adopted in the alternative to their main recommendation:-

²⁰⁶ Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 op cit .

²⁰⁷ ibid para.266

²⁰⁸ ibid para.314

²⁰⁹ ibid para.315

²¹⁰ See Section 1.3

²¹¹ Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 op cit para.333

"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"²¹².

However every one of the Commission's major recommendations was rejected by the conservative Government of 1953 whose primary concern was the preservation of the *status quo ante*²¹³. One of the reasons given for rejecting the Commission's proposals on the law of insanity, was that they extended beyond the law on murder²¹⁴.

This was the last word in England on irresistible impulse as a criminal law defence but it was later admitted, in modified form, into Irish Law as part of the insanity defence. It appears that the medical profession eventually lost interest in it as the categories of volitional and moral insanity became outmoded. But although the most tenacious, it is not the only test of insanity which has been recommended by the medical profession and this was by no means the end of the controversy over the insanity defence.

1.3 THE PRODUCT TEST OF INSANITY

In this section I will examine the "product test" of insanity which provided that an accused should be excused if his act was the product of insanity. Many variants on this theme have been suggested, all of which would have given the medical profession considerable authority in criminal trials. The use of this defence in D.C. from 1954 prompted fresh discussion of the insanity defence and set in motion a train of events which will highlight the futility of redefining the insanity defence.

²¹² ibid para.317

²¹³ N.Walker *Crime and Insanity in England* Vol.1 op cit p.111

²¹⁴ ibid

While irresistible impulse was being urged in English law, the McNaghten Rules were also receiving an onslaught of criticism from the psychiatric profession in the United States. Dr. Isaac Ray, one of the founders of the American Psychiatric Association, believed that mental illness, where the patient seems to be the victim of emotional or "moral" forces beyond his control, can exist in spite of seemingly intact intellectual ability and that the symptoms of mental disease are so diverse that no legal definition or test of universal application is possible²¹⁵. These observations lead him to suggest in his *Treatise on the Medical Jurisprudence of Insanity* (1838) that

"if the mental unsoundness, necessary to exempt from punishment, were required by law to have embraced the criminal act within its sphere of influence, as much perhaps would then be accomplished as is practicable within a specific enactment"²¹⁶.

His personal influence on Judge Charles Doe²¹⁷ led the latter to introduce this principle in a trilogy of New Hampshire cases, starting with Boardman v Woodman²¹⁸. This was a probate case in which Judge Doe offered as a dissenting opinion that delusions were not the test of insanity and that insanity is a question of fact for the jury to decide and not a question of law for the judge to direct the jury on. Judge Doe was aware that a new rule would be less likely to win acceptance than a return to basic principles of common law²¹⁹ which he felt had been corrupted by the failure of the "great lawyers" to distinguish issues of fact from issues of law. According to Reid, although Doe was concerned by the fact that the law advanced an outdated theory of mental disease, his primary concern was the restoration of the distinction between law and fact²²⁰. Hence his dissenting judgment in Boardman:

²¹⁵ L.E.Reik "The Doe-Ray Correspondence: A Pioneer Collaboration in the Jurisprudence of Mental Disease" (1953) 63 Yale L.J.183 pp.184 & 185

²¹⁶ Quoted by N.Walker *Crime and Insanity in England* Vol.1 op cit p.90

²¹⁷ See L.E.Reik op cit generally

²¹⁸ 47 N.H.120 (1845)

²¹⁹ L.E.Reik op cit p.185

²²⁰ J.Reid "Understanding the New Hampshire Doctrine of Criminal Insanity" (1960) 69 Yale L.J.367 at p.372

"The question whether Miss Blydenburgh had a mental disease was a question of fact for the jury, and not a question of law for the court. Whether a delusion is a symptom, or a test, of any mental disease, was also a question of fact, and the instructions given to the jury, were erroneous in assuming it to be a question of law. The jury should have been instructed that if the writing propounded in the probate court was the offspring of mental disease, the verdict should be that Miss Blydenburgh was not of sound mind"²²¹.

His eagerness to have his doctrine accepted by the legal profession was the reason for his failure to accredit Dr.Isaac Ray with it. Antagonism towards the medical profession from the legal profession also meant that insanity had to be put forward as an issue of fact for the jury to decide, without seeming to accommodate recent medical theories²²².

In State v Pike²²³ Judge Doe, serving as junior to Chief Justice Ira Perley, persuaded the latter to instruct the jury that

"whether there is such a mental disease as dipsomania, and whether the defendant had that disease, and whether the killing of Brown was the product of such disease, were questions of fact for the jury"²²⁴.

Under the law as it then stood, the justices of the Supreme Judicial Court who presided as *nisi prius* judges at trial term, also reviewed their own decisions as appellate judges during law term. Thus when Pike appealed his conviction, Doe was able to develop, in a concurring opinion, the theoretical basis for Perley's charge²²⁵. After this decision, Doe sought to minimize his role in it and maximise Perley's,

²²¹ 47 N.H.120 (1845) pp.147 & 148

²²² J.Reid op cit p.376

²²³ 49 N.H.399 (1870)

²²⁴ ibid p.402

²²⁵ J.Reid op cit p.377

hoping that the latter's prestige would lend it respectability in the eyes of the legal profession²²⁶.

Six months after the Pike decision was handed down, Doe presided at another murder trial in which the plea of insanity was entered. Hiram Jones of Newmarket was an uxoricide who had slit his wife's throat from ear to ear with a razor because, he said, she was unfaithful to her marriage vows. The defence specifically asked the court to charge the jury that delusion, knowledge of right and wrong, and irresistible impulse were all tests of criminal responsibility. Doe refused and instead gave substantially the same charge Perley C.J. had given in Pike. Jones appealed but the New Hampshire Appellate Court unanimously approved Judge Doe's charge that if "the killing was the offspring or product of mental disease, the defendant should be acquitted", Ladd J. saying:

"Whether the defendant had a mental disease..seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease, was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of a fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and..symptoms, phases, or manifestations of the disease as legal tests of capacity to entertain a criminal intent..are clearly matters of evidence, to be weighed by the jury upon the question whether the act was the offspring of insanity: if it was, a criminal intent did not produce it; if it was not a criminal intent did produce it, and it was crime"²²⁷.

Among commentators there is disagreement about whether New Hampshire requires that the jury find that the defendant's mental illness *caused* the criminal act before he can be exculpated²²⁸. But in view of the evolution of the New Hampshire

²²⁶ ibid pp.376 & 377

²²⁷ *State v Jones* 50 N.H.369 (1871) pp.398 & 399

²²⁸ J.Reid "The Companion of the New Hampshire Doctrine of Criminal Insanity" (1962) 15 Vand.L.Rev.721 p.740

doctrine from the law of evidence and the fact that at no time did the New Hampshire judges attempt to define "product" and the fact that they expressly held that all definitions of "insanity" (or "responsibility" or "mental disease" etc.) are questions of fact for the jury, the better position is that the New Hampshire doctrine does not require that a causal connection between the mental disease and the act be shown, to exempt from legal responsibility²²⁹. With this in mind it would seem that, despite some contradictory words²³⁰, Judge Doe expressed the New Hampshire position on causation when he said:

"Whether an act may be produced by partial insanity when no connection can be discovered between the act and the disease, is a question of fact"²³¹.

This has led Reid to conclude²³² that Doe intended not only the word "product" to be a question of fact, but also whether or not a finding of causation is necessary, to be a matter of fact for the jury.

Judge Doe confirmed his faith in jury competence in a letter to Dr. Ray dated 14/4/1868²³³

"Giving this matter to the jury leaves the way open for the reception of all progress in your science. One jury is not bound by the verdict of another jury on a general question of fact or science, as courts sometimes feel themselves bound by decisions on general questions of law. My result takes off the shackles of precedent and authority, - opens the subject to be decided in each case as an entirely new subject. Juries may make mistakes, but they cannot do worse than courts have done in this business".

²²⁹ ibid p.741

²³⁰ "An act produced by mental disease is not a crime..Insanity is not innocence unless it produced the killing of his wife." *State v Jones*, 50 N.H.369 (1871) p.370

²³¹ ibid

²³² J.Reid "The Companion of the New Hampshire Doctrine of Criminal Insanity" op cit p.741

²³³ See J.Reik op cit p.188

Although the New Hampshire solution was praised by some, it was criticised by others on the ground that its inherent ambiguity left juries with insufficient guidance on the critical issue of responsibility²³⁴. The practical effect of the New Hampshire rule has been to transfer the decision on insanity to the psychiatrists, as prosecution and defence alike almost unquestioningly accept the psychiatric evidence tendered by the State Mental Hospital²³⁵. Reid reveals that the medical experts tend to limit insanity to psychosis²³⁶ and to require a causal connection between the act and the illness²³⁷, some experts even requiring McNaghten madness before it will return a finding of insanity²³⁸. The obvious inference is that the medical profession decides the issue of insanity based on a misunderstanding of the prevailing test, whilst the true New Hampshire rule is, in effect, ignored. On the other hand, it may be argued that the doctors had to take upon themselves the task which Judge Doe and his successors on the New Hampshire bench should have undertaken; namely to give a separate legal definition of mental illness as a legally excusing condition²³⁹. That the New Hampshire rule did not acquire success, is evident from the fact that for the next eighty three years, no other American jurisdiction adopted the New Hampshire rule or even gave it serious consideration²⁴⁰.

However, this approach to insanity had some supporters in England, as is evident from the testimony of Blackburn J. before the Select Committee on the Homicide Law Amendment Bill in 1874:

"on the question what amounts to insanity, that would prevent a person being punishable or not I have read every definition which I ever could meet with, and never was satisfied with one of them, and have endeavoured in vain to make one satisfactory to myself; I verily

²³⁴ La Fave and Scott Jr *Substantive Criminal Law*, Vol.1 (St.Paul, 1986) p.455

²³⁵ J.Reid "The Working of the New Hampshire Doctrine of Criminal Insanity" [1960] 15 U.Miami L.Rev.14 p.16

²³⁶ ibid p.18

²³⁷ ibid p.27

²³⁸ ibid p.28

²³⁹ M.S. Moore *Law and Psychiatry: Rethinking the Relationship* (London, 1984) p.228

²⁴⁰ La Fave and Scott Jr. op cit p.455

believe that it is not in human power to do it. You must take it that in every individual case you must look at the circumstances and do the best you can to say whether it was the disease of the mind which was the cause of the crime, or the party's criminal will"²⁴¹.

The proposal formulated by the Medico Psychological Association before the Atkin Committee in 1922 was also clearly influenced by developments in the United States. That proposal was that

"(1) the McNaghten rules be abrogated and the responsibility of a person should be left as a question of fact to be determined by the jury on the merits of the particular case.

(2) In every trial in which the prisoner's mental condition is in issue the judge should direct the jury to answer the following questions

(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 nevertheless been proved to the satisfaction of the jury that his crime was unrelated to his mental disorder?"²⁴².

The Atkin Committee's main reason for rejecting this recommendation was their belief that it treated insanity as co-extensive with irresponsibility and it also feared the far-reaching effect of granting immunity to everyone of unsound mind, especially since unsoundness of mind was no longer regarded as a disorder of the intellectual or cognitive faculties but as a morbid change in the emotional and instinctive activities with or without intellectual derangement²⁴³. All the witnesses agreed that the requirement that the prosecution satisfy the jury that the act was unrelated to the mental disorder would cast a burden which could not be discharged²⁴⁴, and when the vagueness of "unrelated" was pointed out, the phrase was altered to "the

²⁴¹ Report and Minutes of Evidence before the Select Committee on the Homicide Law Amendment Bill B.P.P., 1874, Vol. ix p.525

²⁴² Report of the Committee on Insanity and Crime Cmd 2005 op cit p.4

²⁴³ ibid p.5

²⁴⁴ ibid p.4

mental disorder was not calculated to influence the commission of the act"²⁴⁵. However, the Atkin Committee felt that this failed to alter the difficulty of burden of proof²⁴⁶.

The Committee summed up its reasons for rejecting the recommendation of the Medico Psychological Association as follows:-

"In such a case as that mentioned there seems no reason to suppose that during the early stages at least the person would not be affected by every motive for committing or abstaining from committing a criminal act that would be likely to affect a person of sound mind and in substantially the same degree. The difficulty of diagnosis of the state of mind and when some unsoundness of mind was indicated, of establishing the non-relation of the act to the unsound state of mind would introduce so much uncertainty into the administration of the criminal law as to create a public danger"²⁴⁷.

It continued

"It appears to us..that much of the criticism directed from the medical side at the McNaughten Rules is based upon a misapprehension. It appears to assume that the rules contain a definition of insanity, and the legal definition thus obtained is contrasted with the medical conception of insanity..It may be that the judges who framed the rules took into consideration the medical view as to the nature of insanity generally accepted in 1843 if there was one. But it is certain that they were not professing to define "disease of the mind" but only to define what degree of disease of the mind negatived criminality..When once it is appreciated that the question is a legal question, and that the present law is that a person of unsound mind may be criminally responsible,

²⁴⁵ ibid p.5

²⁴⁶ ibid

²⁴⁷ ibid p.6

the criticism based upon a supposed clash between legal and medical conceptions of insanity disappears"²⁴⁸.

Although in 1953, in evidence given before the Royal Commission on Capital Punishment, the Medico Psychological Association (which had now added Royal to its name) were content to rely on the "increasing elasticity" with which the Rules were being interpreted and were no longer in favour of their abrogation, the Gowers Commission felt (with one dissentient) that the test of responsibility encompassed by the McNaghten Rules was so defective that the law on the subject ought to be changed²⁴⁹. The Commission's main recommendation (with three dissentients) was that the McNaghten Rules be abrogated and the jury be left free to determine whether, at the time of the act, the accused was suffering from "disease of the mind or mental deficiency to such a degree that he ought not to be held responsible"²⁵⁰.

Although at first glance this does not appear to resemble Isaac Ray's formulation, the Commission was certainly influenced by it. The Commission categorically denied that mental disease or mental defect of any type is co-extensive with irresponsibility²⁵¹ but stated that

"if it appears that the crime was wholly or very largely caused by insanity then [the accused] ought to be treated as irresponsible; for to punish a person for a crime caused by insanity would in effect be to punish him for his insanity"²⁵².

This echoes the words of the Supreme Court of New Hampshire in State v Jones that

²⁴⁸ ibid

²⁴⁹ Report of the Royal Commission on Capital Punishment Cmd 8932 op cit para.333

²⁵⁰ ibid

²⁵¹ ibid para.280

²⁵² ibid para.285

"No argument is needed to show that to hold that a man may be punished for what is the offspring of disease would be to hold that he may be punished for disease. Any rule which makes that possible cannot be law"²⁵³.

In assessing causation the Commission stated that

"Where a person suffering from a mental abnormality commits a crime, there must always be some likelihood that the abnormality has played some part in the causation of the crime; and generally speaking, the graver the abnormality and the more serious the crime, the more probable it must be that there is a causal connection between them. But the closeness of this connection will be shown by the facts brought in evidence in individual cases and cannot be decided on the basis of any general medical principle"²⁵⁴.

The Commission justified its proposal to allow the jury wide general discretion by saying

"Whatever the rule of law may say, and however broadly it may be interpreted, it can never be all-embracing and it must be expected that members of the jury will sometimes find that their common sense drives them to look behind the rule and to address their minds directly to the essential question of responsibility"²⁵⁵.

The Commission denied that their proposal would lay a difficult or impossible task on the jury and asserted the advantages of the judges' new freedom to direct the juries attention to all the evidence for and against a finding of insanity²⁵⁶.

²⁵³ 50 N.H.369 (1871) p.394

²⁵⁴ ibid para.280

²⁵⁵ ibid para.323

²⁵⁶ ibid para.332

However the Commission's proposals were never enacted and the law on insanity remained precisely the same as it was in 1843. The Commission's recommendation on the wording of the insanity defence has been taken up by a 1978 Interdepartmental Committee on Mentally Ill and Maladjusted Persons which recommended that a variant of it replace the McNaghten-irresistible impulse test of insanity which prevails in Irish law²⁵⁷.

The Royal Commission's report also influenced developments in the U.S., and one year later Judge David Bazelon, in Durham v U.S.²⁵⁸, ruled that if the defendant's act was the product of mental disease or defect he was not criminally responsible. In doing so he overruled the right-wrong test supplemented by the irresistible impulse test which had prevailed until then in D.C.. The court in Durham stated that the "rule we now hold..is not unlike that followed by the New Hampshire court since 1870"²⁵⁹, a statement which has led to the two decisions being twinned together and jointly criticised although they are not in fact the same, as causation is not a legal requirement under the New Hampshire "rule".

Although not well articulated, the court in Durham wished to remedy the well known criticism directed at the insanity tests, that experts were required to testify as to issues beyond their competence²⁶⁰. Whilst the medical experts would advance evidence of disease or defect, the jury would determine the ultimate question of whether the act was the product of mental disease or defect. What *was* clear from the Durham decision was its foundation on the premise that factfinders should be able to weigh any and all expert information about the accused's behaviour²⁶¹.

Durham heralded the arrival of a new reformatory era of punishment instead of the previous utilitarian one and hinted that increasing numbers would be removed

²⁵⁷ Third Interim Report of the InterDepartmental Committee on Mentally Ill and Maladjusted Persons *Treatment and Care of Persons Suffering from Mental Disorder who Appear Before the Courts on Criminal Charges* p.4 para.7

²⁵⁸ 214 F.2d 862 (1954)

²⁵⁹ ibid p.874

²⁶⁰ See the dissenting judgment of Bazelon J. in *U.S.v Brawner* 471 F.2d.969 (1972) p.1014

²⁶¹ D.Bazelon "Justice Stumbles on Science" (1966) 1 Ir.Jur.273 p.277

from the criminal justice system to the mental health system because they suffered from mental disease²⁶².

The shortcomings of Durham soon became obvious. The only explanation given of "mental disease" and "mental defect" was that disease is "a condition which is considered capable of either improving or deteriorating" whereas defect is a nonchanging condition "which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease"²⁶³. The vagueness of these phrases was pointed out in Wright v U.S.²⁶⁴ where the court said "the terms "disease" and "defect" are not so self-explanatory and our definition of them in Durham is not so definitive as to make elucidation always superfluous"²⁶⁵. One of the earliest critics of the Durham rule observed that

"the decision left unresolved the question whether the controlling criterion, "mental disease or defect", was intended to be *psychiatric* (in the sense that psychiatric conceptions of "mental disease" would legally be equated to "insanity") or *jural* (in the sense that the jury's view of "mental disease" would control). Upon this "pending" decision hangs the critical issue of whether psychiatrist or jury will have the final say of criminal responsibility"²⁶⁶.

That the issue of mental disease was to be turned over to the medical witnesses was confirmed in Wright, where the D.C. Court of Appeals defined mental disease as synonymous with mental illness. Then in Carter v U.S.²⁶⁷ the court stated that

"Mental "disease" means mental illness. Mental illnesses are of many sorts and have many characteristics. They, like physical illnesses, are the subject matter of medical science..The problems of the law in these

²⁶² A.Goldstein op cit p.82

²⁶³ 214 F.2d 862 (1954) p.875

²⁶⁴ 250 F.2d 4 (1957) p.11

²⁶⁵ ibid p.11

²⁶⁶ E.De Grazia, "The Distinction of Being Mad" (1955) 22 U.Chi.L.Rev 339 p.347

²⁶⁷ 252 F.2d 608 (1957)

cases are whether a person who has committed a specific criminal act..was suffering from a mental disease, that is, from a medically recognized illness of the mind"²⁶⁸.

This decision gave rise to the problem that "mental disease" exculpated anyone whom psychiatrists chose to label as "mentally diseased." The problem was dramatically highlighted by the "weekend flip flop case", In Re Rosenfield²⁶⁹ where the petitioner was described as a sociopath. A psychiatrist from St.Elizabeth's hospital testified that a person with a sociopathic personality was not suffering from a mental disease. That was on a Friday afternoon. On Monday morning, through a policy change at the hospital, it was determined, as an administrative matter, that the state of a psychopathic or sociopathic personality did, afterall, constitute a mental disease. Whatever the psychiatrist testified amounted to "mental disease", he was making a judgment about criminal responsibility, a judgment that he was not authorised to make and with respect to which he is not expert²⁷⁰. (In this respect Durham differed from the New Hampshire doctrine and the recommendation of the Royal Commission on Capital Punishment (1953) where the issue of insanity is clearly a jural question). The effect of the reduction of insanity to a scientific question was to minimise the relevance of moral judgment, although *pace* Fletcher I do not feel that this was the implicit ambition of Durham²⁷¹. The end result was that in McDonald v U.S.²⁷² the D.C. Court of Appeals stated that "a "mental disease or defect" for clinical purposes..may or may not be the same as mental disease or defect for the jury's purpose in determining criminal responsibility"²⁷³, thus replacing the issue of "mental disease or defect" on the jury.

Where there was agreement on the existence of mental disease the controversy shifted to "product"²⁷⁴. The jury was left entirely dependent on the expert's

²⁶⁸ ibid p.617

²⁶⁹ 157 F.Supp 18 (1957)

²⁷⁰ H.Fingarette *The Meaning of Criminal Insanity* op cit pp.31 & 32

²⁷¹ G.P.Fletcher *Rethinking Criminal Law* (Boston, 1978) p.840

²⁷² 312 F.2d 847 (1962)

²⁷³ ibid p.851

²⁷⁴ A.Goldstein op cit p.85

classification of conduct as the "product" of mental disease²⁷⁵. As a result, in Washington v U.S.²⁷⁶, psychiatric testimony on the issue of productivity was prohibited, on the ground that such testimony was likely to usurp the jury's function of resolving the ultimate question of guilt. Further, it was said that the "product" requirement assumed a compartmentalized mind, like McNaghten had done, because it implied that mental disease "caused" some unlawful acts and not others²⁷⁷. Although the New Hampshire test also requires that the act be a product of mental disease, their requirement of causation is less objectionable as it does not amount to a substantive legal rule. On a philosophical level, the problem with the requirement of causation in Durham was the failure to see the possibility of there being differing sets of equally sufficient conditions existing to cause the same event. To say that a bodily movement is the product of an abnormal condition of the brain does not preclude one from describing that movement as an action performed by an agent for reasons²⁷⁸. The practical effect of Durham was that it shifted the court-room controversy from the words of the insanity defence to the nature of the particular disease and to whether the criminal act was the product of such disease²⁷⁹. Wright and Carter attempted to clarify the "product test" by the adoption of a "but for" test (i.e. the crime would not have occurred "but for" the mental disease or defect). Because it is not possible to say that a crime would have been committed if mental disease or defect had not been present, the result of the "but for test" was a direct move from a finding of mental disease to a finding of lack of responsibility²⁸⁰. While thirty four acquittals on the basis of Not Guilty by Reason of Insanity had been given during the four years previous to the application of the Durham rule, in the four years after Durham was decided the number of acquittals from insanity pleas rose to one hundred and fifty²⁸¹. Durham left lawyers feeling that the liberty of the individual was seriously threatened: he or she was no longer regarded as a person with rights but as an object of control according to scientific techniques²⁸².

²⁷⁵ ibid p.84

²⁷⁶ 390 F.2d 444 (1967)

²⁷⁷ A.Goldstein op cit p.84

²⁷⁸ M.S.Moore op cit p.226

²⁷⁹ A.Goldstein op cit p.85

²⁸⁰ S.Glueck *Law and Psychiatry* op cit p.103

²⁸¹ Winslade and Ross *The Insanity Plea* (New York, 1983) p.211

²⁸² A.Norrie op cit p.184

While Durham centred on the effect of mental disease or defect on the conduct of the actor, it provided no measure of the necessary effect which was present in the McNaghten Rules and even in the irresistible impulse test. In these formulations at least the jury was presented with the task of determining whether the mental disease had the effect of impairing cognitive or volitional capacities²⁸³. With no standard by which to judge the evidence the jury was left with the burden of deciding between conflicting expert testimony as to whether the defendant was suffering from "mental disease" and whether his act was the "product" of disease.

The erosion of Durham began in 1962 with McDonald v U.S. where the court said

"neither the court nor the jury is bound by *ad hoc* definitions or conclusions as to what experts state is a disease or defect..The jury should be told that a mental disease or defect includes any abnormal condition of the mind or emotional process that substantially impairs behaviour controls. The jury would consider testimony concerning the development, adaptation and functioning of these processes and controls"²⁸⁴.

In short, Durham had travelled a remarkably circuitous path towards the conclusion that the jury needed some guidance, and that words like mental disease and product were inadequate and that the standard would have to incorporate somehow, a description of the sorts of effects of disease that were relevant to compliance with the criminal law²⁸⁵. That the jury is left with no standard with which to judge the evidence, is an objection that applies equally to the New Hampshire rule and to the recommendation of the Royal Commission on Capital Punishment (1949-53). A variation of the Royal Commission's test had been approved by a minority of the

²⁸³ D.H.J.Hermann *The Insanity Defense: Philosophical Historical and Legal Perspectives* (Illinois, 1983) p.46

²⁸⁴ 312 F.2d 847 (1963) p.851

²⁸⁵ A.Goldstein op cit p.86

American Law Institute, a body of noted attorneys, judges and scholars which had undertaken to revise the criminal law and to write a model penal code that could be adopted by the states²⁸⁶, as an alternative to the test adopted in the code. This variation of the Royal Commission's test was urged as a replacement of the Durham test by Bazelon J. in Brawner. Bazelon's test proposed that

"A defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible for his act"²⁸⁷.

However the court in Brawner²⁸⁸ was impressed by Professor Goldstein's warning in *The Insanity Defense*²⁸⁹ that the

"overly general standard [*whether the accused may justly be held responsible*] may place too great a burden upon the jury. If the law provides no standard, members of the jury are placed in the difficult position of having to find a man responsible for no other reason than their personal feeling about him. Whether the psyches of individual jurors are strong enough to make that decision, or whether the "law" should put that obligation on them, is open to serious question. It is far easier for them to perform the role assigned to them by legislature and courts if they know - or are able to rationalize - that their verdicts are "required" by law".

Rejecting the Gowers Commission's proposal as an alternative to the Durham rule, the court in Brawner expressed the view²⁹⁰

²⁸⁶ La Fond and Durham op cit p.36

²⁸⁷ 471 F.2d.969 (1974) p.1032

²⁸⁸ ibid p.988

²⁸⁹ A.Goldstein *The Insanity Defense* op cit pp.81 & 82

²⁹⁰ 471 F.2d.969 (1972) p.987

"that an instruction overtly cast in terms of "justice" cannot feasibly be restricted to the ambit of what may properly be taken into account but will splash with unconfinable and malign consequences".

Whilst admitting that

"there may be a tug of appeal in the suggestion that law is a means to justice and the jury is an appropriate tribunal to ascertain justice"

it claimed²⁹¹

"This is a simplistic syllogism that harbors the logical fallacy of equivocation, and fails to take account of the different facets and dimensions of the concept of justice..The thrust of a rule that in essence invites the jury to ponder the evidence on impairment of the defendant's capacity and appreciation, and then do what to them seems just, is to focus on what seems "just" as to the particular individual. Under the centuries-long pull of the Judeo-Christian ethic, this is likely to suggest a call for understanding and forgiveness of those who have committed crimes against society but plead the influence of passionate and perhaps justified grievances against that society, perhaps grievances not wholly lacking in merit..The judgment of a court of law must further justice to the community, and safeguard it, against undercutting and evasion from overconcern for the individual. What this reflects is not the rigidity of retributive justice..but awareness how justice in the broad may be undermined by an excess of compassion as well as passion. Justice to the community includes penalties needed to cope with disobedience by those capable of control, undergirding a social environment that broadly inhibits behavior destructive of the common good. An open society requires mutual respect and regard and mutually reinforcing relationships among its citizens, and its ideals of

²⁹¹ ibid p.988

justice must safeguard the vast majority who responsibly shoulder the burdens implicit in its ordered liberty. Still another aspect of justice is the requirement for rules of conduct that establish reasonably generality, neutrality and constancy..This concept is neither static nor absolute, but it would be sapped by a rule that invites an ad hoc redefinition of the "just" with each new case."

As a result of the Durham experience, when the American Law Institute (A.L.I.) made its recommendations on insanity for its Model Penal Code, a year after the decision in Durham, it rejected the advice of its psychiatric advisory committee, which endorsed Durham²⁹², and adopted the following test:-

- (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 used in this Article, the terms "mental disease" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

Although signalling a return to the McNaghten and irresistible impulse tests, the A.L.I.'s formula contained two important changes. It used "appreciate" instead of "know" in the McNaghten Rules, which suggested that responsibility required a deeper level of understanding than mere knowledge or perception. The wording of section 2 ensured that psychopaths would not be encompassed by the insanity defence²⁹³ (it is commonly asserted that a psychopath is one who exhibits an abnormality only in the repetitious performance of antisocial or criminal acts)²⁹⁴. Although the formulation did not use the words "irresistible impulse", the terminology "to conform his conduct" made it clear that impairment of volitional capacity as well as impairment of cognition should be considered in determining criminal responsibility. The substitution of language avoided the criticism directed at the "irresistible impulse" test by the Gowers Commission in 1953, that volitional control

²⁹² A.Goldstein op cit p.87

²⁹³ S.Glueck *Law & Psychiatry* op cit p.68

²⁹⁴ La Fave and Scott Jr. op cit p.439

may be impaired not only by a sudden occurrence but may be impaired after brooding²⁹⁵. Furthermore, the word "substantial" eliminated the need to show total impairment of cognitive or control capacities²⁹⁶. Because no more than three essential facts were required under the A.L.I. test, if psychiatry decided in the future to classify other abnormal behaviour as symptomatic of a mental illness that impaired a person's ability to obey the law, individuals thus afflicted could raise the insanity defence to criminal charges arising out of such behaviour²⁹⁷.

Court after court refused to adopt Durham, using the occasion to reaffirm its faith in free will and deterrence, its hostility to psychiatry and the deterministic view of human behaviour, its scepticism about psychiatry's status as a science and its fear that the concept of mental disease was so broad that it might encompass all or most serious crime and especially the psychopath²⁹⁸. The author of the Durham formula, Judge Bazelon, has described his own reasons for abandoning it in the following terms:

"In the end, after eighteen years, I favoured the abandonment of the Durham rule, because, in practice it had failed to take the issue of criminal responsibility away from the experts. Psychiatrists continued to testify to the naked conclusion instead of providing information about the accused so that the jury could render the ultimate moral judgment about blameworthiness. Durham had secured little improvement over McNaghten"²⁹⁹.

Professor Goldstein is of the view that "*Durham's* principal contribution has been less as a "solution" to the insanity problem than as a dramatic demonstration that there are no solutions"³⁰⁰. Durham was finally overruled in U.S. v Brawner in favour

²⁹⁵ D.H.J.Hermann op cit pp.50 & 51

²⁹⁶ ibid p.50

²⁹⁷ La Fond and Durham op cit p.42

²⁹⁸ A.Goldstein op cit p.92

²⁹⁹ Quoted by the Butler Committee on Mentally Abnormal Offenders Cmnd 6244 para.18.15 from Bazelon, "Psychiatrists and the Adversary Process", (1974) Sci.Am.230

³⁰⁰ A. Goldstein op cit p.213

of a variant of the Model Penal Code rule, a rule which has been urged (albeit unsuccessfully) in court, as the appropriate test of insanity in Irish Law³⁰¹.

The A.L.I. rule was far more successful³⁰², possibly a reaction of the legal profession against the degree to which Durham had been championed by psychiatrists and in part, as a result of the widespread acceptance of the stereotyped view of McNaghten and irresistible impulse - a view which Durham did a great deal to intensify³⁰³. In 1961 only one state had a standard similar to the A.L.I. test. By 1985 approximately half of the states used the A.L.I. test, either *verbatim* or with slight modifications³⁰⁴.

However this flight to the A.L.I. formula did not continue. The Model Penal Code was open to the same objection as Durham in its reference to "mental disease or defect" but its second limb raised other problems. In particular, the test of capacity to conform had to face a well-known philosophical criticism. How can one tell the difference between an impulse which is irresistible and one which is merely not resisted?³ ⁵. Judge David Bazelon, author of the Durham rule, stated squarely in U.S. v Brawner that

"Instead of asking a jury whether the act was caused by the impairment, our new test asks the jury to wrestle with such unfamiliar if not incomprehensible concepts as the capacity to appreciate the wrongfulness of one's action, and the capacity to conform one's conduct to the requirements of law. The best hope for our new test is that jurors will regularly conclude that no-one - including the experts - can provide a meaningful answer to the question posed by the ALI test"³⁰⁶.

³⁰² *People A.G v Michael McGlynn* [1967] 1.R.232

³⁰³ Perkins & Boyce op cit p.978

³⁰⁴ A Goldstein op cit pp 92 & 93

³⁰⁵ R F Schopp "Returning to McNaghten to Avoid Mora M stakes" 1988 30 Ariz L Rev 135 p 137

³⁰⁶ Report of the (Butler Committee on Mentally Abnormal Offenders cit para. 8 16

³¹ 471 F 2d 969 p 1031

It is not necessary to criticize the A.L.I. formula in much depth as it is no more than a reformulation of the McNaghten and irresistible impulse tests³⁰⁷ and the main defects in those two tests (which have already been dealt with) are present in the A.L.I. formulation. The phrase "as a result of" prolongs the requirement of a causal connection which was the cause of so much controversy while Durham reigned and use of the words "substantial capacity" and "appreciate" has been questioned on the ground that they are bound to encourage differences among expert witnesses and also among jurors over whether the defendant's degree of impairment or depth of awareness was sufficient³⁰⁸. No doubt these objections influenced the rejection of the A.L.I. test by a majority of the Canadian Royal Commission on the Law of Insanity, the Massachusetts Special Commission on Insanity and by the New Jersey Supreme Court³⁰⁹. There is weak but provocative support for the conclusion that switching from the McNaghten test which prevailed in most states, to the A.L.I. test, also resulted in more successful insanity pleas. Between 1966 and 1972, Oregon had only 44 successful insanity pleas using the McNaghten test; between 1972 and 1982, a total of 734 insanity acquittals occurred using the A.L.I. standard. Maryland experienced an increase of 143% in the proportion of defendants found not guilty by reason of insanity in the years after that state changed from McNaghten to the A.L.I. test³¹⁰.

After the Hinckley verdict (when President Reagan's would-be assassin was acquitted by reason of insanity), seven states made changes that restricted the definition and use of the insanity defence. Four jurisdictions changed from the A.L.I. or McNaghten plus irresistible impulse tests to the simple McNaghten test. Two jurisdictions restricted the use of the insanity defence to certain types of offences and one jurisdiction repealed the plea and the test of insanity altogether³¹¹. At this time, reports of the American Psychiatric Association and the American Bar Association

³⁰⁷ S.Glueck *Law and Psychiatry* op cit pp.68 & 69

³⁰⁸ La Fave and Scott Jr. op cit p.466

³⁰⁹ S.Glueck *Law and Psychiatry* op cit p 69

³¹⁰ La Fond and Durham op cit p 136

³¹¹ Callahan, Mayer and Steadman "Insanity Defense Reforms in the U.S. - post-Hinckley" 2 *Mental and Physical Disabilities Law Reporter* (1987) 54 p.55

were advocating a cognitive test of insanity³¹². The American Bar Association's *Criminal Justice Mental Health Standards* stated that

"psychiatric information relevant to determining whether a defendant understood the nature of his act, and whether he appreciated its wrongfulness, is more reliable and has a stronger scientific basis, than for example, does psychiatric information relevant to whether a defendant was able to control his behavior"³¹³.

The American Bar Association accordingly rejected the "control" test in favour of an exclusively cognitive test because it concluded that "there are occasional mistakes, and..these mistakes are most likely to be associated with the volitional criterion"³¹⁴. It added that "any volitional inquiry involves a significant risk of 'moral mistakes' in the adjudication of responsibility"³¹⁵.

In what has been viewed as an attempt to save the insanity defence from complete extinction³¹⁶, the United States Congress in 1984 enacted legislation that took the power to decide which version of the insanity defence to adopt away from the federal circuit courts of appeal, and mandated that a uniform insanity test be used in all federal prosecutions³¹⁷. Several of the bills introduced in Congress in the aftermath of the Hinckley verdict would have done away with the insanity defence altogether and limited evidence of mental illness solely to the issue of the defendant's *mens rea*³¹⁸. As a result, Congress responded by passing legislation which restricted the scope of the insanity defence even further than McNaghten had done and would excuse a criminal defendant only

³¹² D.B.Wexler "Redefining the Insanity Problem" (1985) 53 Geo.Wash.L.Rev.528 p.532

³¹³ ibid

³¹⁴ ibid

³¹⁵ ibid

³¹⁶ LaFond and Durham op cit p.64

³¹⁷ ibid p.63

³¹⁸ ibid p.64

"if at the time of the offense, the defendant, as a result of *severe* mental illness or defect, was *unable* to appreciate the nature and quality or the wrongfulness of his acts"³¹⁹.

1.4 JUSTIFICATIONS OF THE INSANITY DEFENCE

Any discussion of the insanity defence must involve consideration of why we excuse the insane. If a defence for the insane cannot be justified then we would be better off abolishing it, a view which has been adopted in recent years by many American academics³²⁰. On the other hand, if the insane do merit excuse, then, arguably, the insanity defence should apply to all insane persons who commit criminal acts and not just to a restricted group of insane persons.

Bracton's 13th century treatise *On the Laws and Customs of England* excused the insane on the basis of the principle *furiosus solo furore punitur* - a madman is punished by his madness alone. This justification of the insanity defence was borrowed from Roman law³²¹ but it is difficult to accept it as a justification for the insanity defence today. In practice it has been subsumed by a more rational justification. This is that a madman cannot be blamed as he is *amens (id est) sine mente*, without his mind or discretion and *actus non facit reum nisi mens sit rea*. This approach is similar to the law's treatment of children under ten years of age, who are treated as being incapable of having *mens rea* and who cannot be found guilty of a criminal offence. This rationale for the insanity defence goes back at least as far as 1280 when a Nottingham jury, who tried a man who had hanged his daughter in a frenzied state, certified that "he did as aforesaid, and not feloniously or through malice afore-thought"³²². However, unless the state of *mens rea* presupposes a guilty *healthy* mind it is not easy to see that the insane offender does in fact lack *mens rea*, particularly if the state of mind required for the offence is objective recklessness or strict liability. Fingarette feels that the equating of insanity with lack of *mens rea* has been responsible for the assumption that the specific conditions that normally show

³¹⁹ ibid p.63

³²⁰ See section 1.5 below

³²¹ N. Walker *Crime and Insanity in England* Vol.1 op cit p.24

³²² ibid p.19

absence of *mens rea* are also the ones that must be shown to be present where there is insanity³²³. As a result, the insanity defence has been limited to cognitive and volitional impairment. Furthermore, the use of this justification may render the insanity defence otiose³²⁴ since any person who lacks *mens rea* will in any event be acquitted.

A third justification which is commonly urged on behalf of the special verdict is that an insane offender lacks blame for what he has done. Although closely allied to the *mens rea* principle it seems to be based on compassionate rather than academic grounds. The York plea rolls for the year 1212 record a case in which

"The King must be consulted about an idiot who is in the prison because in his witlessness he confessed that he is a thief, although in fact he is not to blame"³²⁵.

This was the justification underlying **Durham v U.S.**, which held "[o]ur collective conscience does not allow punishment where it cannot impose blame"³²⁶. This is also a justification for the defence of diminished responsibility which reduces the responsibility of those who are less blameworthy for their criminal acts. Another

³²³ H.Fingarette op cit p.136

³²⁴ C.Wells "Whither Insanity" [1983] Crim.L.R.787 p.794

³²⁵ N.Walker *Crime and Insanity in England* Vol.1 op cit p.19

³²⁶ 214 F.2d 862 (1954) p.876

³²⁷ La Fave and Scott Jr.op cit p.432

³²⁸ G.P.Fletcher op cit p.817

³²⁹ N.Morris *Madness and the Criminal Law* (Chicago, 1982); Goldstein and Katz "Abolish the 'Insanity Defense'-Why Not?" (1963) 72 Yale L.J. 853; Winslade and Ross op cit; C.Wells op cit; H.Wechsler "The Criteria of Criminal Responsibility" (1955) 22 Uni.Chi.L.Rev 367

³³⁰ The (1949-1953) Royal Commission on Capital Punishment's justification has been specifically targeted as an object of this criticism.

³³¹ Goldstein and Katz op cit p.859

³³² ibid p.863

³³³ N.Morris op cit p.55

³³⁴ This closely resembles how S.H Kadish treated the arguments in an article "The Decline of Innocence" (1968) 26 C.L.J.273 pp.277-278

³³⁵ ibid p.277

³³⁶ Winslade and Ross op cit p.198

³³⁷ S.H Kadish op cit p.277

³³⁸ Winslade and Ross d Vol.1 op cit p.19

³³⁹ 214 F.2d 862 (1954) p.876

rationale for excusing the insane is that the process of prosecution, conviction and imposition of sanctions which serves to educate the public by making known what conduct is prohibited by the criminal law, cannot serve this function by punishing the insane. Because this group is regarded as not blameworthy their punishment could only blur the distinction between good and bad conduct and thus work against the education theory³²⁷. A final justification which is commonly urged on behalf of the insanity defence is Bentham's view that the deterrent effect of the law cannot have its usual impact on insane offenders and hence, punishing an insane offender will not deter those who can identify with him. The problem with this justification is that there is no way to say *a priori* that some people should be excluded from the category of potential deterrables and without empirical evidence the argument of pointless punishment hardly generates a rationale for the existing excusing conditions in the law³²⁸.

1.5 PROPOSALS TO ABOLISH THE INSANITY DEFENCE

As a result of the American experience, many academics have abandoned attempts to reformulate the insanity defence and prefer instead to advocate its abolition³²⁹. They have questioned the purpose of the insanity defence, stating that this "either has been assumed to be so obvious as not to require articulation³³⁰ or has been expressed in such vague generalizations as to afford no basis for evaluating the multitude of formulae"³³¹. Examination of the *mens rea* rationale has led the abolitionists to the conclusion that "[w]ithout the essential element of *mens rea* there is no crime from which to relieve the Defendant of liability and consequently, since no crime has been committed, there is no need for formulating an insanity defense"³³².

³²⁷ La Fave and Scott Jr. op cit p.432

³²⁸ G.P.Fletcher op cit p.817

³²⁹ N.Morris *Madness and the Criminal Law* (Chicago, 1982); Goldstein and Katz "Abolish the "Insanity Defense"-Why Not?" (1963) 72 Yale L.J. 853; Winslade and Ross op cit; C.Wells op cit; H.Wechsler "The Criteria of Criminal Responsibility" (1955) 22 Uni.Chi.L.Rev 367

³³⁰ The (1949-1953) Royal Commission on Capital Punishment's justification has been specifically targeted as an object of this criticism.

³³¹ Goldstein and Katz op cit p.859

³³² ibid p.863

Some abolitionists favour the invocation of insanity, as evidence bearing on the presence or absence of *mens rea*. According to Morris³³³ this was the *status quo* until the 19th century

"But by the time of McNaghten (1843) this clear position was frustrated by the increasing tendency of lawyers, psychiatrists, public opinion and legislators to turn questions of evidence into matters of substance and to transmute medical evidence about legal issues into substantive legal rules. McNaghten was just such a substantive rule confusing evidence for a proposition with the proposition itself".

By far the most radical proposal has been the removal of the concept of responsibility from the law and with it the insanity defence. These abolitionists would have insanity considered at the sentencing stage, in deciding how to dispose of the offender.

A variety of arguments have been put forward in favour of abolition, which can be encapsulated within four main headings³³⁴: Failure of administration of the tests of insanity; Lack of practical importance of the insanity defence; The insane are not the only offenders who should be held not responsible; The present situation is bad; abolition would make it better.

The abolitionists claim that the administration of the insanity tests has been a failure³³⁵ because at the end of the day the jury's decision depends on either over-identification with or alienation from the defendant³³⁶. The jury's decision will often be largely governed by the credentials and presentation of the psychiatric experts³³⁷ who are encouraged to parade their opinions, guesses and speculations under the

³³³ N.Morris op cit p.55

³³⁴ This closely resembles how S.H Kadish treated the arguments in an article "The Decline of Innocence" (1968) 26 C.L.J.273 pp.277-278

³³⁵ ibid p.277

³³⁶ Winslade and Ross op cit p.198

³³⁷ S.H Kadish op cit p.277

banner of scientific expertise³³⁸. Thus insanity is a "rich man's defense" in that it favours the wealthy who can afford the array of experts needed to mount a convincing defence whilst discriminating against the poor who cannot afford the time of influential experts - experts who are in short supply and whose time would be better spent treating those who have been committed to hospital or imprisoned³³⁹. Because of the above, and the fact that there is no workable distinction between responsibility and irresponsibility, psychiatry should not frame the dividing line between the two³⁴⁰. Three further arguments have been advanced in favour of abolition³⁴¹. Firstly, the crucial decision to be made concerns the proper disposition of mentally abnormal persons who commit criminal acts, and this is a matter which is better dealt with in a direct way following conviction than indirectly during trial. Secondly, a number of informed observers believe that it is therapeutically desirable to treat behavioural deviants as responsible for their conduct rather than as involuntary victims playing a sick role. Thirdly, persons channelled out of the criminal process following a finding of insanity are not protected against administrative abuse of their rights to the same degree that they would be if they remained within the criminal justice system.

Those in favour of abolition also stress that the defence of legal insanity is of little practical importance. With increasing frequency, issues concerning the mental abnormality of the offender are being taken into account after conviction rather than before³⁴². Another abolitionist argument is that the retention of the distinction between those to be punished and those only to be treated is unfortunate and invidious because it is in all cases, not only in some, that persons who do harms should be treated and held in the interest of the public's protection. In most crimes psychical and social determinants inhibit the capacity of the actors to control their behaviour³⁴³. The abolitionists assert that the present situation is bad and that abolition could only make it better³⁴⁴.

³³⁸ Winslade and Ross op cit p.198

³³⁹ La Fave and Scott Jr. op cit p.433

³⁴⁰ N.Morris op cit pp.55 and 56

³⁴¹ See La Fave and Scott Jr. op cit pp.433 and 434

³⁴² S.H.Kadish op cit p.277

³⁴³ N.Morris op cit p.59

³⁴⁴ S.H.Kadish op cit p.278

The abolitionist argument has not fallen on deaf ears. Rising crime rates and the coincident widening of the insanity defence convinced many Americans that the two were related³⁴⁵. Strict commitment criteria applied following a finding of insanity, with the result that insane offenders, if not considered mentally ill *and* dangerous, could be released within hours of acquittal. When the American public learned that John Hinckley could be released from Saint Elizabeth's Hospital at virtually any time, public awareness of the insanity defence changed dramatically³⁴⁶. An Associated Press-NBC newpoll in 1981 following the Hinckley verdict, showed that 70% of the American public favoured total elimination of the insanity defence. The state Legislatures of Idaho, Montana and Utah responded by completely abolishing the insanity defence³⁴⁷. The Supreme Courts of Montana and Idaho upheld the constitutionality of abolishing the insanity defence and the U.S. Supreme Court indicated that it too, would not strike down as unconstitutional, legislation that abolished the insanity defence.

However, this is not to say that the abolitionist argument has received unanimous support. Kadish has answered all the abolitionist arguments. He concedes that the administration of the insanity defence is very bad indeed but scarcely the only feature of our criminal justice system which is badly administered in practice³⁴⁸. Inefficiency and inequity are endemic to a system committed to an adversary process but not committed to supplying the resources of legal contest to the typically penurious who make up the bulk of criminal defendants³⁴⁹. The lesson of all this would not be to abandon the adversary method on that score, but to improve its operation. Likewise with the insanity defence, improvement of its operation rather than its abolition would seem to be the more appropriate response³⁵⁰.

³⁴⁵ La Fond and Durham op cit p.151

³⁴⁶ Ibid p.76

³⁴⁷ Ibid p.65

³⁴⁸ S.H Kadish op cit p.278

³⁴⁹ Ibid

³⁵⁰ Ibid

To the extent that the case for abolition rests on the inequitableness and irrationality of its administration, the very infrequency of the invocation of the insanity defence reduces the import of the criticism³⁵¹. The defences of necessity or duress are invoked in a minute fraction of criminal cases, yet few would regard this as a reason for abandoning them³⁵². The function of a legal defence is not measured by its use but by its usefulness in the total framework of the criminal justice system³⁵³.

If a crime requires mere negligence then absence of an insanity defence would leave the defendant with no defence at all, since all that is required is that the defendant has fallen substantially below the standard of the reasonable man and this, by definition, a McNaghten defendant has done³⁵⁴ (except, of course, to the extent that the subjective feature of the concept of negligence - requiring that some special characteristics of the defendant be considered in defining the standard, as for example, his inability to see or hear - were enlarged to embrace his special cognitive disabilities)³⁵⁵.

The proposal for abolition opens to the condemnation of a criminal conviction a class of persons who, on any common sense notion of justice are beyond blaming and ought not to be punished³⁵⁶. It is true that a person adjudicated Not Guilty by Reason of Insanity suffers a substantial social stigma but this results from the misinterpretation placed upon the person's conduct by people in the community³⁵⁷. It is not, like the conviction of the irresponsible, the paradigmatic affront to the sense of justice in the law which consists in the deliberative act of convicting a morally innocent person of a crime, of imposing blame when there is no occasion for it³⁵⁸.

³⁵¹ ibid p.279

³⁵² ibid

³⁵³ ibid

³⁵⁴ ibid p.280

³⁵⁵ ibid

³⁵⁶ ibid pp.282 & 283

³⁵⁷ ibid p.283

³⁵⁸ ibid

Further arguments for retaining the insanity defence are the requirement that the decision be made by a jury, representative of the public, rather than by experts³⁵⁹. Moreover, the receipt of psychiatric input in a trial, subject to traditional adversary procedures filters out the genuine from the fraudulent³⁶⁰. The American experience of abolition has shown that efforts to keep the insanity question out of the criminal trial have been largely unsuccessful³⁶¹ with the result that psychiatric evidence has to be heard twice, firstly, as bearing on the issue of *mens rea* and secondly, in deciding the appropriate disposition. The result is that the defendant is given "two shots at the same thing". In addition to the extra cost to the state, a defendant may be handicapped by financial incapacity to procure psychiatric testimony for two hearings³⁶².

More recently, the Butler Committee on Mentally Abnormal Offenders rejected proposals made by the British Psychological Society and others to abolish the special verdict³⁶³. Two kinds of two-stage trial were proposed. According to the first, the jury (in a trial on indictment) would find the external facts and it would then be for the sentencer (the judge) to find what was the defendant's mental state at the time of the act, as one of the matters bearing upon sentence. Under this system the trial would not be concerned with the notions of guilt and responsibility except insofar as such matters had a bearing on the appropriate measures to be taken to prevent a recurrence of the forbidden act. The Committee felt that it would not be acceptable to remove these questions altogether from the jury and that in theory, the proposal would render a person involved in a fatal accident through no fault of his own, liable to detention for life, in the same way as if he had committed murder. Such protection as he would have would rest only on a wise use of discretion by the sentencing tribunal. The Committee felt that sentencers would apparently be left with no guidance on the relative importance that the community attaches to different prohibitions and some

³⁵⁹ LaFave and Scott Jr. op cit p.435

³⁶⁰ ibid

³⁶¹ See Louisell and Hazard "'Insanity Defense' The Bifurcated Trial" (1961) 49 Calif.L.Rev.805 for an insight into the operation of the bifurcated trial in California, Colorado Texas and Louisiana

³⁶² ibid p.823

³⁶³ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit paras.18.10-18.13

parts of the present law which rest particularly upon proof of intention, such as the law of conspiracy and attempt, would become unworkable³⁶⁴.

The second form of the proposal the Committee felt to be less extreme: it would allow the jury to decide the question of guilt in the first stage and hear and pronounce on psychiatric evidence in the second stage. However, they felt³⁶⁵ that this makes the mistake of supposing that the question of guilt can be decided merely by the establishment of the external facts. The defendant's state of mind, with possible psychiatric evidence bearing upon it, necessarily arises in the first stage and cannot be removed from it. In consequence, this form of two-stage trial would sometimes lead to the jury having to consider the same psychiatric evidence twice: in the first stage, on the issue of guilt in relation to the definition of the offence, and in the second stage, on the issue of exemption from responsibility on account of mental disorder. In these circumstances there is no advantage, and some disadvantage in separating the trial into two stages, as was found in California when this form of trial was introduced there.

The Committee felt that the decline in the use of the special verdict to the point where it is scarcely used at all, did not indicate that the law need no longer provide for total exemption from criminal responsibility for the mentally disordered offender³⁶⁶ and they then went on to reformulate the insanity defence.

1.6 REPORT OF THE (BUTLER) COMMITTEE ON MENTALLY ABNORMAL OFFENDERS (1975)

In 1972 the Butler Committee embarked upon the formulation of an insanity defence suitable for the Law Commission's Draft Criminal Code. The history of the

³⁶⁴ ibid para.18.12

³⁶⁵ ibid para.18.13

³⁶⁶ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.18.10

insanity defence had taught them that certain requirements must be met by any reformulated insanity defence³⁶⁷, namely that it should

- (a) avoid the use of medical terms about which there may be disputed interpretations or whose meaning may change with the years; and
- (b) be such as to allow psychiatrists to state the facts of the defendant's mental condition without being required to pronounce on the extent of his responsibility for his offence. Degrees of responsibility are legal, not medical concepts.

Moreover, to the extent that the question of "insanity" is to remain one for the jury to decide the defence must

- (c) avoid the use of words and expressions which may confuse the jury and
- (d) be capable of being the subject of a clear direction by the judge.

The Committee reported in 1975 and recommended³⁶⁸ that the jury be directed to return a verdict of "not guilty on evidence of mental disorder" where satisfied

- (1) that the defendant is not proved to have had the state of mind necessary for the offence and where they are satisfied on the balance of probability that at the time of the act or omission he was mentally disordered or
- (2) where they are satisfied on the balance of probability that at the time he was suffering from severe mental illness or severe subnormality.

The judge would be required not to leave (2) to the jury unless the defence was supported by the evidence of two psychiatrists, who must be medical practitioners, approved by an area health authority as having special experience in the diagnosis or treatment of mental disorders (with an exception for transient states of mental disorder).

³⁶⁷ ibid para.18.17

³⁶⁸ Report of the (Butler) Committee on Mentally Abnormal Offenders para.18.37

For the purposes of section (1), "mental disorder" means the same as it does in section 4 of the Mental Health Act, 1959 - that is

"mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind"

The Committee stressed³⁶⁹ that "mental disorder" would not embrace transitory states not related to other forms of mental disorder and arising solely as a consequence of (a) the administration, mal-administration or non-administration of alcohol, drugs or other substances, or (b) physical injury.

For the purposes of section (2), the Committee defined mental subnormality by drawing on its meaning under section 4(2) of the Mental Health Act, 1959 as

"a state of arrested or incomplete development of mind which includes subnormality of intelligence and is of such a nature or degree that the patient is incapable of living an independent life or of guarding himself against serious exploitation, or will be so incapable when of an age to do so".

The Committee stated³⁷⁰ that "A mental illness is severe when it has one or more of the following characteristics:-

- (a) Lasting impairment of intellectual functions shown by failure of memory, orientation, comprehension and learning capacity.
- (b) Lasting alteration of mood of such degree as to give rise to delusional appraisal of the patient's situation, his past or his future, or that of others, or to lack of any appraisal.
- (c) Delusional beliefs, persecutory, jealous or grandiose.
- (d) Abnormal perceptions associated with delusional misinterpretation of events

³⁶⁹ ibid para.18.23

³⁷⁰ ibid para.18.35

(e) Thinking so disordered as to prevent reasonable appraisal of the patient's situation or reasonable communication with others".

Finally the Committee stressed³⁷¹ that severe mental illness or severe subnormality would not include psychopathic disorder, subnormality or the other abnormal states of mind mentioned in section 4 of the Mental Health Act, nor the transient states excluded under the Committee's proposals for section (1) of the special verdict.

To summarize, section (1) excludes from criminal liability one who did the prohibited act without *mens rea* and who is proved to have been suffering from "mental disorder" at the time of the act. Section (2) would save from conviction one who did the act with *mens rea* but who is proved to have been suffering from "severe mental illness" or "severe subnormality" at the time of his offence.

As with every other insanity test that I have discussed, the Butler Committee criteria are equally open to objection. Limb 1 has been criticised, firstly, on the grounds that McNaghten's ghost will still be with us insofar as the mental disorder must be sufficient to create a reasonable doubt that the defendant had the intention, foresight or knowledge required for the offence. Those varieties of mental disorder which affect not cognition but motivation and will power would strictly fall outside this ground for the special verdict³⁷². Secondly, it has been pointed out that the inclusion of psychopathic disorder within section 1 of the Mental Health Act, 1959 will be of little avail to the psychopath who will only qualify for a mental disorder verdict in the unlikely event of his lacking *mens rea*³⁷³.

It is not clear that the Butler Committee's insanity defence will meet requirement (d)³⁷⁴ that is, that it be capable of being the subject of a clear direction by the judge. In fact the Butler test may be far from clear to the doctors who are required

³⁷¹ ibid para.18.30

³⁷² A.J.Ashworth "The Butler Committee and Criminal Responsibility" [1975] Crim.L.R.687 p.689

³⁷³ Ashworth and Shapland "Psychopaths in the Criminal Process" [1980] Crim.L.R.628 p.631

³⁷⁴ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.18.17

to testify as to the accused's mental state. Although "severe subnormality" is already defined in section 4(2) of the Mental Health Act, 1959 the term "severe mental illness" is not a term of art in law or psychiatry³⁷⁵. The Mental Health Act does not provide a definition of mental illness and the criteria Butler list for "severity" increase the likelihood of disagreement among experts. If the practical effect of the Butler formula is that medical witnesses are to be entrusted with the decision as to what constitutes mental illness, then the Butler Committee defence will be greeted with the same criticism as the Durham rule was. In fact the Medical Advisory Committee of Broadmoor Hospital has rejected the definition altogether, suggesting that "the psychiatric disorder in this context is something which the jury should decide"³⁷⁶.

It is noteworthy that in the Butler formulation there is no requirement of causal connection, as the Committee thought that the disorders specified are of such severity that a causal connection can safely be presumed. Treating insanity as a status exempting from responsibility signals a return to the policy of the eighteenth century and earlier, when the mentally disordered were regarded as a category outside the bounds of responsibility like children under ten are today³⁷⁷. Kenny points out two bad effects of this approach to insanity³⁷⁸. On the one hand, it gives a certified mental patient a licence which is not given to others (he knows that there are certain things which he may do without being held criminally responsible, while all others not of the same status will be held responsible). On the other hand, it attaches a stigma to insanity by assuming, without any need of proof, that insanity, as such, predisposes to criminal action. The concern here is a resurfacing of the age-old conflict between lawyers and psychiatrists. For the former the accused might be suffering from a severe mental illness, but still retain a residue of responsibility for his actions; for the latter, the medical condition explains all the accused's actions³⁷⁹. Although the Butler approach avoids the criticism that was directed at Durham's "product test", the Law Commission felt that a requirement of causal connection is necessary and in Clause

³⁷⁵ A.Ashworth op cit p.690

³⁷⁶ E.Griew "Let's Implement Butler on Mental Disorder and Crime!" [1984] C.L.P.47 p.56

³⁷⁷ A.Kenny "Anomalies of section 2 of the Homicide Act 1957" (1986) 12 J.Med.Ethics 24 p.25

³⁷⁸ ibid

³⁷⁹ A.Norrie op cit pp.185 & 186

35(2) of the Draft Criminal Code provides that the mental disorder verdict does not apply if the court or jury is satisfied beyond reasonable doubt that the offence was not attributable to the severe mental disorder. As Norrie points out "In this apparently innocuous clause, there lurks the germ of the old law psychiatry conflict, unresolved..[and] the possibility..of an open power struggle in the courts between lawyers and psychiatrists remain[s]"³⁸.

The Butler Committee point out that the phrase "arrested or incomplete development of mind" in section 4 of the Mental Health Act, 1959 should be wide enough to cover not only all dangerous mentally handicapped people but also persons of limited intelligence who might otherwise gain an outright acquittal. Unfortunately the Committee do not specify whether the danger of a person repeating the offence is part of the definition of mental subnormality or whether limited intelligence by itself is sufficient to bring a person within this definition³⁸¹. Similarly the Committee do not specify the relevance of the danger of recurrence when they recommend that expressly excluded from the special verdict should be any case in which the mental disorder is a transient state, not related to other forms of mental disorder, and caused by physical injury or by the abuse of alcohol, drugs or other substances but that "all other cases now regarded as non-insane automatism would be left to fall under the special verdict"³⁸². Whilst expressing a wish to exclude from their mental disorder verdict a person who had failed to take insulin, who was concussed or who had unintentionally become intoxicated³⁸³, they fail to discuss the issues of somnambulism, fainting and strokes which, it appears, may still result in a mental disorder verdict. In this respect the Commission seem to have fallen short of their aim of clarifying the distinction between the special verdict and the existing law on non-insane automatism³⁸⁴.

The enactment of the Mental Health Act, 1983 has posed problems for the Butler Committee formulation. Severe subnormality has now given way to severe

³⁸⁰ ibid p.186

³⁸¹ A.J.Ashworth op cit p.689

³⁸² Report of the (Butler) Committee on Mentally Abnormal Offenders op cit para.18.23

³⁸³ ibid

³⁸⁴ A.J.Ashworth op cit p.690

mental impairment. Now "arrested or incomplete development of mind" must also be "associated with abnormally aggressive or seriously irresponsible conduct"³⁸⁵. Two meanings of this phrase might cause confusion. In any event the Draft Criminal Code Bill contains some radical alterations. The Code requires a finding of "severe mental illness" or "severe mental handicap" under section (1). The Code has defined severe mental handicap as

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

In Clause 34 of the Code Bill "mental disorder" is defined as

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

In light of the history of the insanity defence it should not be assumed that the Draft Criminal Code definition will fare any better than previous tests of insanity. It will be impossible for the prosecution to prove that the crime was unattributable to the mental disorder. Thus, the decision as to responsibility will hinge on the expert's testimony of severe mental illness or severe mental handicap, a move which proved fatal to the Durham Rule.

1.7 CONCLUSION

The above discussion has shown the impossibility of formulating a test of insanity that will prove satisfactory to all. As early as 1896 the Criminal Responsibility Committee of the Medico Psychological Association reported that

³⁸⁵ E.Griew op cit p.57

"the framing and answering of new abstract questions [on the criminal responsibility of the insane], if it could be brought about, would be but the beginning of a new controversy and of new heart-burnings"³⁸⁶.

Similarly, the Gowers Commission concluded in 1953

"that it is not possible to define with any precision the state of mind which should exempt an insane person from responsibility".

These observations were proved correct as the irresistible impulse rule, the product test and the A.L.I.'s test were beleaguered by criticism. The controversy did not stem exclusively from the wording of the defence but involved a wide range of social issues, for example, the decision who should be held responsible to the law and liable to punishment (or to the death penalty as the case may be) and who should be excused and receive treatment (or be released where this applies). As is evident from the discussion of Durham and irresistible impulse *above*, it also involved the issue of whether law or medicine should decide the dividing line between responsibility and irresponsibility.

In England much of the controversy over the McNaghten Rules stemmed not from "any defect in themselves but the fact that..persons who [were] totally irresponsible [were] rarely at large, and if at large, [were] rarely put on trial: persons of diminished responsibility [were] frequently put on trial, and when they [were] convicted and sentenced to death, it [was] erroneously supposed that the McNaghten Rules [had] failed in their purpose"³⁸⁷. This is a criticism whose import has been curtailed by the operation of diminished responsibility in English law since the Homicide Act, 1957 which is premised on the notion of partial or lesser responsibility when the accused was suffering from mental abnormality.

³⁸⁶ C.Mercier op cit p.220

³⁸⁷ P.Devlin "Responsibility and Punishment: Functions of Judge and Jury" op cit p.685

Wexler suggests³⁸⁸ that public distrust of the insanity defence today stems "almost exclusively" from its application in homicide cases³⁸⁹. Similarly Professor Norval Morris claims that "the insane killer" is "at the heart of the argument about the special defence"³⁹⁰.

Other observers feel that the polemic stems from the dispositional consequences attached to the insanity defence. This view is lent weight by the American controversy over the insanity defence, whose consequence was often immediate release unless mentally ill and dangerous. Hence the words of an American commentator

"The public's concern is less with ascertaining whether blame properly can be assigned to a particular defendant than with determining when he will get out. And the delusion of law professionals to the contrary notwithstanding, it is the public's concern that drives the debate on possible changes in the insanity defense"³⁹¹.

In the United States the focus of concern was whether insane defendants were released from custody before they had paid for their crime. In England and Ireland the controversy has been fuelled by the mandatory indefinite committal of insanity acquittees who are neither insane nor dangerous. English Parliament remedied the situation somewhat in 1957 by providing a partial defence of diminished responsibility for mentally abnormal murderers. The result of a successful plea of diminished responsibility is a manslaughter conviction to which are attached wide methods of disposal. In 1991 English Parliament went further by enacting the Criminal Procedure (Insanity and Unfitness to Plead) Act which extended these discretionary disposal consequences to offenders found insane under the McNaughten Rules, in respect of offences whose sentence is not fixed. This piece of legislation, which has been anticipated as the solution to the McNaughten dilemma, is likely to

³⁸⁸ D.B.Wexler op cit p.542

³⁸⁹ Later Wexler qualifies this by stressing the public's concern with "stranger killings"

³⁹⁰ N.Morris op cit p.73

³⁹¹ Quoted by LaFond and Durham op cit p.77

revive the United States polemic on English territory. The first case under the new act was reported under the provocative headline "'Drink Mad' Attacker Walks Free"³⁹². The defendant was a 36-year-old Petty Officer who suffered from serious brain damage such that small amounts of alcohol could motivate him without warning to dangerous acts of violence. The jury found him not guilty of attempted rape on the grounds of insanity and Auld J. discharged him.

Mackay and Kearns' research on the first cases dealt with under the 1991 Act has revealed the imposition of a supervision and treatment order in disposing of a defendant who pleaded somnambulism to a charge of attempted murder³⁹³. With no legal sanctions available to deal with an offender who does not comply with treatment or the conditions of the order³⁹⁴ there is huge potential for public outrage.

On the other hand the failure of the Act to provide for discretionary disposal consequences in murder cases and insanity defences at Magistrates Court level³⁹⁵ makes this piece of legislation a very half-hearted measure. As a result of the latter failure, unconditional liberation is the likely result of a successful insanity defence at Magistrates Court level³⁹⁶. This view is reinforced by the provision that in choosing between orders for guardianship, supervision and treatment and absolute discharge the court must select that which "in all the circumstances of the case is the most suitable means of dealing" with the defendant but no similar requirement governs the making of a hospital order. The implication is that a court may make an admission order even though it does not think such an order to be the most suitable disposition, for example, where a special verdict has been returned in respect of an atrocious attempted murder by a defendant whose sanity is restored by the time of trial but whose outright release might provoke public outrage³⁹⁷. This half-heartedness is also evident in the absence

³⁹² *The Daily Telegraph*, 15 Jan.1992

³⁹³ "The Continued Underuse of Unfitness to Plead and the Insanity Defence" [1994] Crim.L.R.576 p.578

³⁹⁴ Dolan and Campbell "The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991". (1994) 34 Med, Sci & L.155 p.160

³⁹⁵ See P.Fennell "The Criminal Procedure (Insanity and Unfitness to Plead) Act 1991" (1992) 55 M.L.R.547 at pp.550 & 551

³⁹⁶ S.White "Insanity Defences and Magistrates'Courts" [1991] Crim.L.R.501 p.503

³⁹⁷ S.White "The Criminal Procedure (Insanity and Unfitness to Plead) Act" [1992] Crim.L.R.4 p.10

of any provision allowing for appeal against a decision of the Crown Court to choose one disposition rather than another. I have already discussed the failure to surrender any degree of sovereignty to the medical profession, by the requirement of medical evidence under section 1(1) which is to have no binding force³⁹⁸.

Ireland has enacted no such legislation amending the mandatory consequence of indefinite committal to the state mental hospital, release being at the Government's pleasure. A defence of diminished responsibility would abate the controversy which surrounds the insanity defence if there is truth in the view that it stems from acquittals by reason of insanity in murder cases. If the polemic stems from where the dividing line between responsibility and irresponsibility should be drawn, then diminished responsibility, which is premised on the notion of partial responsibility would alleviate the controversy where murder is concerned. There have been hints by a succession of Irish Governments since 1991 that an Irish defence of diminished responsibility is imminent. For the moment an examination of the defence of diminished responsibility is in order, to ascertain whether it has been successful in satisfactorily disposing of mentally abnormal murderers and alleviating the controversy over the McNaghten Rules.

³⁹⁸ E.Baker op cit p.86

CHAPTER TWO

THE HOMICIDE ACT, 1957 AND THE DEFENCE OF DIMINISHED RESPONSIBILITY IN ENGLISH LAW

"This doctrine, which is now firmly established, has, in the view of the Criminal Authorities, worked satisfactorily and has the effect of preventing convictions of murder in the technical sense and consequent sentences of death where the prisoners are abnormal from a mental aspect, and tends greatly to the side of mercy"³⁹⁹.

2.1 THE ORIGIN OF THE ENGLISH DEFENCE OF DIMINISHED RESPONSIBILITY

Although a feature of ancient Irish and Germanic law, Roman law⁴⁰⁰ and Dutch law of the middle ages⁴⁰¹, diminished responsibility is relatively novel in English law. In this Chapter, I will trace its development in Scottish law, from which it was borrowed in 1957. (English Parliament had already gone half-way in 1922 by adopting a partial defence of infanticide, restricted to women who killed their children). By examining the Parliamentary debates which preceded the Homicide Act. 1957, I will show that it was hastily adopted to placate those M.Ps. who advocated the abolition of capital punishment and that lack of discussion of the defence would later lead to uncertainty as to its limits, with virtually the only guide-lines coming from Scottish law. The end result was that the English Judiciary was placed in the difficult position of having to legislate which mental abnormalities would fall within the defence of diminished responsibility (and *vica versa*, which would not), a decision which ought to have been taken by the draughtsmen and Parliamentarians. In this Chapter I will examine the decision to admit irresistible impulse, epilepsy and other

³⁹⁹ Evidence from the Scottish Crown Agent to the Royal Commission on Capital Punishment (1949-53) Cmd 8932 para.383

⁴⁰⁰ M.Zeegers "Diminished Responsibility: A Logical, Workable and Essential Concept" (1981) 4 Intl.J.Law and Psychiat.433 pp.435 & 436

⁴⁰¹ N.Walker *Crime and Insanity in England* Vol.1 (Edinburgh, 1968) p.139 shows that the Scottish defence of diminished responsibility was borrowed from Dutch law.

states traditionally viewed as falling within the defence of automatism, and pre-menstrual tension within the scope of the diminished responsibility plea and the limitations placed on the right to plead mental abnormality arising from intoxication. This will show that diminished responsibility has been a satisfactory solution to the limitations of the McNaghten Rules and that it has abated the medico/legal conflict at the heart of the controversy over the insanity defence.

As stated, the English defence of diminished responsibility has its roots in Scottish law where it was developed in order to avoid the consequences of the death penalty. In Scotland the defence made its first appearance in Sir George MacKenzie's *The Laws and Customs of Scotland in Matters Criminal* (1674) where he claimed that

"..since the law grants a total impunity to such as are absolutely furious therefore it should by the rule of proportions lessen and moderate the punishments of such, as though they are not absolutely mad yet are Hypochondrick and Melancholy to such a degree, that it clouds their reason"⁴⁰².

The earliest cases of diminished responsibility were non-capital charges where the court imposed a reduced sentence in view of the accused's mental condition⁴⁰³. In capital cases mental weakness could be taken into account only by way of the Royal prerogative of mercy⁴⁰⁴. Mitigation of punishment because of partial insanity was in stark contrast to the English law on the subject, as stated by Hale:

"There is a partial insanity of mind..some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears or griefs, and yet are

⁴⁰² ibid

⁴⁰³ G.H.Gordon *The Criminal Law of Scotland* (2nd ed) (Edinburgh, 1978) p.381

⁴⁰⁴ ibid

not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons, that are felons of themselves, and others are under a degree of partial insanity when they commit these offences.. The best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony"⁴⁰⁵.

It was not until the decision in Dingwall⁴⁰⁶ that the practice was established of returning a verdict of culpable homicide rather than murder, in those cases in which responsibility was thought to be diminished. Dingwall was tried for the murder of his wife by stabbing her with a knife in the arm and side. "Habitually and irreclaimably addicted to drinking", he committed the fatal deed after his wife had hidden a pint bottle of whiskey and some money from him, to prevent him from getting more alcohol. Lord Deas pointed out to the jury that

"if [they] believed that the prisoner, when he committed the [murder of his wife], had sufficient mental capacity to know, and did know, that the act was contrary to the law, and punishable by the law, it would be their duty to convict him⁴⁰⁷" but he "could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence"⁴⁰⁸.

In deciding whether to convict the accused of culpable homicide rather than murder, the relevant considerations were

1. the unpremeditated and sudden nature of the attack;

⁴⁰⁵ Hale *Historia Placitorum Coronae*, Vol.1 (London 1736), p.30

⁴⁰⁶ (1867) 5 Irv.466

⁴⁰⁷ ibid pp.475 & 476

⁴⁰⁸ ibid p.479

2. the prisoner's habitual kindness to his wife; of which there could be no doubt when drink did not interfere;
3. that there was only one stab or blow; this while not perhaps like what an insane man would have done, was favourable for the prisoner in other respects;
4. that the prisoner appeared not only to have been peculiar in his mental constitution, but to have had his mind weakened by successive attacks of disease. It seemed highly probable that he had had a stroke of the sun in India, and that his subsequent fits were of an epileptic nature. There could be no doubt that he had had repeated attacks of *delirium tremens*, and if weakness of mind could be an element in any case in the question between murder and culpable homicide, it seemed difficult to exclude that element here⁴⁰⁹.

Dingwall was found guilty of culpable homicide and sentenced to ten years' penal servitude. It should be noted that Lord Deas did not regard the accused's mental weakness as the only basis for a verdict of diminished responsibility; Rather, it was one of a number of grounds which he thought might justify such a verdict⁴¹⁰ - a view which he continued to espouse until his retirement in 1887⁴¹¹. A culpable homicide verdict obviated any risk of a recommendation to mercy being rejected and also left the treatment of the accused in the hands of the judge who could impose what he considered to be a suitable sentence⁴¹².

Thus the doctrine of diminished responsibility took 193 years come to fruition, a delay which Dr.Wright holds its creator, MacKenzie, partly responsible for⁴¹³. The object of punishment in early days was primarily retribution and any interference with the revenge due to the lieges (higher Lords) was unlikely to be met with kindly. (The accused had to suffer the full penalty as a lesser penalty would not have appeased the wrath of the lieges at the heinousness of the crime⁴¹⁴). MacKenzie was suggesting that

⁴⁰⁹ ibid

⁴¹⁰ G.H.Gordon op cit p.382

⁴¹¹ F.McAuley *Insanity Psychiatry and Criminal Responsibility* (Dublin, 1993) p.155

⁴¹² G.H.Gordon op cit p.388

⁴¹³ Dr.Wright *The Development of Legal Responsibility in the Criminal Law of Scotland* PhD 1954 Aberdeen University p.240

⁴¹⁴ ibid

punishment be moderated without explaining that the quality of the act was seriously to be questioned when the accused suffered from mental illness⁴¹⁵. Part of the fault may also lie with the Scottish jurists Hume and Alison, neither of whom found MacKenzie's suggestion acceptable and who went to great lengths to ensure that there were only two classes of accused - the sane and the insane⁴¹⁶. One must also bear in mind the absence of medical knowledge of the working of the brain and its disorders and the court, charged with the protection of society, was not willing to show too much compassion towards the accused lest it be accused of emotionalism⁴¹⁷.

Dr.Wright has ventured to suggest that in Somerville (1704) and Spence (1747) the court was very near to enunciating the doctrine and that had there been suitable cases following close upon their heels, it is doubtful whether Scotland would have had to wait until Dingwall before the unveiling of her humane doctrine⁴¹⁸. The spirit of the doctrine had been living and there for any to take up and consider its possible application in practice⁴¹⁹. Erskine admitted its existence when he said that the lesser degrees of fatuity saved from the *poena ordinaria* but he too, focused attention upon the moderation of punishment without linking it to a reduction in the quality of the crime⁴²⁰. Dr.Wright feels⁴²¹ that the doctrine was beginning to make itself felt as the nineteenth century approached but in Kinloch (1795) the Lord Advocate, Dundas, rejected this third category of accused - neither sane nor absolutely furious. Alison hesitantly acknowledged the lessening of responsibility but he was too closely allied to Hume to be able to unfetter his mind of the requirement of absolute alienation of reason⁴²². At this point in time, a liberal exercise of the Royal prerogative of mercy permitted the court to adopt a strict interpretation of the kind of insanity which excused the prisoner and Dr.Wright considers that this also contributed to the delay in launching the doctrine⁴²³.

⁴¹⁵ ibid

⁴¹⁶ ibid p.241

⁴¹⁷ ibid

⁴¹⁸ ibid

⁴¹⁹ ibid

⁴²⁰ ibid pp.241 & 242

⁴²¹ ibid p.242

⁴²² ibid

⁴²³ ibid

To some it was disappointing that such an important case as Dingwall had been heard on circuit and when Tierney⁴²⁴ was tried for murder neither the prosecution nor the defence saw fit to refer Lord Ardmillan to Dingwall⁴²⁵. It was not to be long, however, before the opportunity arose again and this time the court ensured that the doctrine was accepted fully as part of the criminal law of Scotland. John McLean's case⁴²⁶ was certified after the jury found him guilty, with a recommendation to mercy on account of his weak intellect. McLean's medical history showed a stay of two years in a lunatic asylum and for more than a year he had been in the refractory ward. It may be that the trial judge (Lord Moncrieff) had found himself unable to direct the jury on the lines of diminished responsibility as the charge was theft and the doctrine had been applied in a case of murder only. The court consisted of the Lord Justice-Clerk, Lord Deas, Lord Young and Lord Craighill. Lord Deas had no doubt that it was proper for the court to take into consideration, in awarding sentence, the mental weakness of the accused, saying

"I am of opinion that, without being insane in the legal sense, so as not to be amenable to punishment, a prisoner may yet labour under that degree of weakness of intellect or mental infirmity which may make it both right and legal to take that state of mind into account, not only in awarding the punishment, but in some cases, even in considering within what category of offences the crime shall be held to fall"⁴²⁷.

Lord Deas' example was followed by his fellow judges. In several of the cases in which this direction was given there was evidence of a weakness of the mind by alcoholism⁴²⁸. Lord McLaren also considered the doctrine of diminished responsibility

⁴²⁴ (1875) 3 Couper 152

⁴²⁵ Dr. Wright op cit p.245

⁴²⁶ (1876) 3 Couper 334

⁴²⁷ ibid p.337

⁴²⁸ *H.M. Advocate v Andrew Granger* (1878) 4 Couper 86; *H.M. Advocate v Thomas Ferguson* (1887) 4 Couper 552; *H.M. Advocate v John MacDonald* (1890) 2 White 517; *H.M. Advocate v David Kane* (1892) 2 White 386; *H.M. Advocate v John Graham* (1906) 5 Adam 212, all of which are discussed further in section 2.8 of this chapter.

to be relevant in a case of child murder⁴²⁹. The same judge in H.M. Advocate v Robert Smith⁴³⁰ considered that the judge would be justified in giving effect to the defence if they found that the accused's mind had become so unhinged by a long course of verbal persecution that he had finally reacted to a trivial insult by shooting his tormentors. The Scottish defence of diminished responsibility was restricted to some debility amounting to brain disease in Aitken⁴³¹. By 1909, if not earlier, the phrase "diminished responsibility" was being used by judges and by the 1930's the stage had been reached at which the defence of insanity was rarely offered in a Scottish court to a charge of murder⁴³². Moreover, the Lord Advocate seems to have been willing to accept medical evidence of diminished responsibility to reduce the charge itself to culpable homicide⁴³³. Thus, almost all the cases where the issue figured at trial were those in which the Lord Advocate's Crown Office had not been satisfied that responsibility had been diminished⁴³⁴.

Despite the finding of the Royal Commission on Capital Punishment (1949-53) that the Scottish defence of diminished responsibility worked well⁴³⁵, it was not introduced into English law until 1957. Given its creation in Scotland in 1867, the adoption of diminished responsibility into English law was a very lengthy process. By tracing this process it will be seen that, although hastily adopted in 1957 to placate the opponents of the death penalty, England had ample experience of the defence of diminished responsibility in the form of the Infanticide Acts of 1922 and 1938 and the evidence of its satisfactory operation in Scottish law. I will now trace the tentative steps towards creating the defence which were taken in the Infanticide Acts of 1922 and 1938, prior to the adoption of a full defence of diminished responsibility *via* the Homicide Act, 1957.

⁴²⁹ *H.M. Advocate v Abercrombie* (1896) 2 Adam 163

⁴³⁰ (1893) 1 Adam 34

⁴³¹ (1902) 4 Adam 88

⁴³² N. Walker op cit p.144

⁴³³ ibid

⁴³⁴ ibid

⁴³⁵ Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 op cit p.276

2.2 THE INTRODUCTION OF THE DEFENCE OF DIMINISHED RESPONSIBILITY INTO ENGLISH LAW.

2.2.1 Infanticide

English law's first concession to the Scottish practice of reducing murder to manslaughter on evidence of mental unsoundness, was the introduction of the partial defence of infanticide in 1922. By tracing the history of this defence I will show its similarities with diminished responsibility in Scotland and how the adoption of a full defence of diminished responsibility in English law was just a short step away.

Throughout the nineteenth century determined efforts were made to circumvent the death penalty in cases of child-murder by women, with the last execution for this crime occurring in 1849. The insanity defence played a significant role in the salvation of this class of female murderer from the damnation of the death penalty. As I have shown in Chapter One, medical evidence of an irresistible impulse, which was so fervently resisted by the judiciary, was often taken seriously in the case of women who had killed their children⁴³⁶. Medical theories of puerperal and lactational insanity were openly embraced by the courts in an endeavour to exculpate these women, as occurred in Wilson (1864)⁴³⁷. At the trial of Eliza Dart⁴³⁸ for the attempted drowning of her daughter, Lord Justice Brett stated that "it was a mistake to suppose that, in order to satisfy a jury of insanity, scientific evidence must be adduced. If the evidence of facts were such as to indicate an unsound state of mind that was quite sufficient" and very often verdicts of insanity were returned where its only evidence was in the commission of the deed itself, particularly where the killing was accompanied by circumstances of poverty or other hardship⁴³⁹.

The Home Secretary's mercy was a final safeguard against the death penalty and it is at this point that parallels with the Scottish practice begin. According to Sir

⁴³⁶ See section 1.2, *above*

⁴³⁷ Described by R. Smith in *Trial by Medicine* (Edinburgh, 1981) pp.152 & 153

⁴³⁸ 14 C.C.C.143 p.144

⁴³⁹ R. Smith op cit pp.148-160 describes a series of these cases.

George Grey's evidence to the Royal Commission on Capital Punishment of 1866, Home Secretaries were aware that public opinion was against hanging for infanticide:

"I do not think that it would be possible for any one, consistently with public opinion, which must have a great influence in these matters, to carry the sentence in these cases into effect; and that, I believe, is the opinion of almost every person who tries them"⁴⁴⁰.

Reprieves were granted to women like Maria Clarke (1851) and Mrs Maria Chitty⁴⁴¹ where circumstances of poverty had prevailed at the time they had killed their children. Even in as notorious a case as that of Celestina Somner, "the Brighton murderer", the Home Secretary issued a reprieve after she had been found guilty of the murder of her ten-year-old stepdaughter⁴⁴².

By the time the Royal Commission on Capital Punishment of 1866 reported, infanticide had emerged as an issue of national importance in England⁴⁴³. This Behlmer attributes to four factors⁴⁴⁴: Firstly, that child-murder had reached such epidemic proportions by the 1860's as to demand attention from a public normally disposed to ignore unpleasant social realities. Secondly, that disturbing knowledge of the practice of child-murder as a custom in British India broke upon the popular consciousness just when medical journals were starting to decry domestic infanticide. The County Coroners Act of 1860 was followed by a 17% increase in the amount of money spent on inquests in England and Wales and this corresponded with a 31% increase in the number of verdicts of murder returned by coroners' juries. Fourthly, greater receptiveness to domestic subjects of a sensational nature during a time of peace ("peace must have offered dull reading") and increased circulation of the London dailies meant that news of infanticide could make a greater impact on the national consciousness.

⁴⁴⁰ Report of the Royal Commission on Capital Punishment 1866, B.P.P.1866, Vol.XXI p.193

⁴⁴¹ R.Smith op cit pp.148 & 149

⁴⁴² ibid p.154

⁴⁴³ G.K.Behlmer "Deadly Motherhood: Infanticide and Medical Opinion in mid-Victorian England" (1979) 34 Journal Hist.Med.403 p.406

⁴⁴⁴ ibid pp.406-409

Despite the perceived scale of infanticide, the evidence given before the Royal Commission on Capital Punishment of 1866 showed that the law had completely broken down in relation to child-murder⁴⁴⁵. Shee J. spoke of "the utter and hopeless failure of the existing theory of the law of murder as respects infanticide"⁴⁴⁶; Lord Cranworth stated that infanticide was "practically never" treated as murder⁴⁴⁷; Bramwell B. had tried nine cases of infanticide and in eight of them the prisoner was either acquitted or found guilty of concealment of birth (a lesser alternative verdict) and in one exception the jury found the prisoner guilty of manslaughter⁴⁴⁸. Lord Wensleydale had had a great number of cases of infanticide but never a conviction as "the woman always escaped"⁴⁴⁹ (a plot, which evidence before the Royal Commission shows that the judges were conspirators to). Keating J. deposed "[i]t is in vain that Judges lay down the law and point out the strength of the evidence, as they are bound to do, juries wholly disregard them, and eagerly adopt the wildest suggestions which the ingenuity of counsel can furnish..Juries will not convict whilst infanticide is punished capitally"⁴⁵⁰ and in similar vein, Byles J. thought that practically every case of concealment of birth was in fact a case of infanticide, a crime which had greatly increased and was of daily occurrence⁴⁵¹.

Some explanations were offered for this reluctance to convict infanticidal mothers. According to Blackburn J. "the whole sympathies of everyone seem to me against the law which treats this crime as not different from other murders"⁴⁵². Some witnesses were of the opinion that child murder was not as heinous as other forms of murder. A child could not be regarded in the same light as an adult; the loss to the child could not be estimated. The prevailing view was that the killing of a child by its mother did not create the same feeling of alarm in society as other forms of murder

⁴⁴⁵ D.Seaborne Davies "Child-Killing in English Law" (1937) 1 M.L.R.203 p.217. For the sake of convenience I treat the evidence before the 1866 Commission in substantially the same manner and order as Seaborne Davies does in this article.

⁴⁴⁶ Report of the Royal Commission on Capital Punishment 1866 op cit p.628

⁴⁴⁷ ibid p.4

⁴⁴⁸ D.Seaborne Davies op cit p.217

⁴⁴⁹ Report of the Royal Commission on Capital Punishment 1866 op cit p.49

⁴⁵⁰ ibid p.625

⁴⁵¹ ibid p.627

⁴⁵² ibid p.624

did and public opinion, consequently, did not insist upon the death sentence as a deterrent. The general opinion was that the common motive of hiding the shame of an illegitimate birth lessened the heinousness of the crime and that the execution of the law in its full severity would be barbarous. There was a widespread realisation that bad economic conditions frequently led to the commission of these crimes and that the malice was generally less in this class of murder because of the general state of health and mind of the perpetrators of them.

The judges' view was that the "solemn mockery" of the law, which compelled them to pass the death sentence where it would never be carried out, contributed to reduce the deterrent value of capital punishment and it was widely believed that the breakdown of the law was responsible for the perceived increase in the number of child murders. A minority of members recommended that infanticidal mothers be dealt with by giving jurors the power to bring in a verdict of "guilty of murder" with "extenuating circumstances". Keating J. would have allowed the jury to decide between capital and non-capital cases⁴⁵³; Sir Morduant Wells would have restricted this power to cases of infanticide⁴⁵⁴ with the effect being to reduce murder to culpable homicide as in Scotland⁴⁵⁵. However, the other proponents of this jury discretion were vague and unspecific and gave no indication that mental unsoundness should be a prerequisite to this finding nor that the verdict of murder should be reduced to some lesser charge. The majority view was that this discretion would be better vested in the judges as juries would almost always find the accused guilty with extenuating circumstances rather than guilty of murder whose possible consequence was the death penalty.

As a result the Royal Commission recommended⁴⁵⁶ that an act should be passed "making it an offence - unlawfully and maliciously to inflict grievous bodily harm or serious injury upon a child during its birth, or within seven days afterwards, in case such a child has subsequently died. No proof that the child was completely

⁴⁵³ ibid p.625

⁴⁵⁴ ibid pp.468 & 469

⁴⁵⁵ ibid p.469

⁴⁵⁶ ibid p.1

born alive should be required". They objected to concealment of birth being an alternative verdict on an indictment of murder and felt that the accused should not be entitled to be acquitted on trial for the new offence, or for concealment if it should be proved that the offence amounted to murder or manslaughter. Finally, they recommended restoration of the judicial power to record the death sentence (which had been abolished by the Offences Against the Person Act, 1861). However no action was taken to implement these recommendations.

In 1872 the Homicide Law Amendment Bill provided that if a woman murdered her child "at or soon after birth, and whilst deprived of her ordinary power of self-control by the physical effects of its birth", the trial judge in his discretion could sentence her to penal servitude for any term of not less than five years⁴⁵⁷. The first attempt to have infanticide treated like manslaughter (and hence like the more recent Scottish defence of diminished responsibility) occurred when the above bill was reintroduced in 1874. Section 29(3) stated "[c]riminal homicide is manslaughter and not murder..[i]f the person whose death is caused is the child of the person who causes it, and if the act by which death is caused is done whilst such last-mentioned person, though not within the provisions of section 24 [which dealt with the exemptive effects of insanity] is deprived of the power of self-control by any disease or state of mind or body produced by bearing the child whose death is caused"⁴⁵⁸.

Concurrently with the Homicide Law (Amendment) Bill another group of members was attempting to pass an Infanticide Law Amendment Bill introduced in 1873 and 1874, which in its amended form proposed that concealment of birth should be repealed as an alternative on an indictment of murder and that a new felony should be created to meet the case of a mother maliciously wounding or inflicting grievous bodily harm upon her child during or immediately after its birth, punishable with penal servitude for a term not exceeding ten years or with imprisonment for a term not exceeding two years⁴⁵⁹.

⁴⁵⁷ B.P.P.1872, Vol.ii p.247

⁴⁵⁸ Homicide Law (Amendment) Bill 1874, B.P.P. 1874, Vol.ii p.372

⁴⁵⁹ B.P.P.1874, Vol.ii p.409

Both bills were referred to a Select Committee in 1874. Stephen justified according the mitigating effects of provocation to infanticide by reminding the witnesses of the practical impossibility of getting a jury to convict of infanticide when occurring at the time of the birth and by claiming that "a woman in that state is entitled to some kind of indulgence to human weakness"⁴⁶⁰. Although Baron Bramwell praised section 29(3) as "a very excellent one"⁴⁶¹, Cockburn L.C.J. demurred to the failure of the section to deal with child killing by omission⁴⁶². Blackburn J. appeared to favour the Infanticide Bill over Stephen's section 29(3)⁴⁶³. He too, objected to the latter's failure to deal with child killing by omission, where it could not be proved that the mother had done violence to the child⁴⁶⁴. He also protested at the treatment of this provision in a clause altering the law of murder, instead of making it a separate enactment⁴⁶⁵. This approach appears to reveal a bias on the part of Blackburn J. in favour of according infanticide the status of a substantive offence as opposed to a defence to a charge of murder. Stephen countered by saying "I should look with great jealousy on any attempt to make a special offence, which is a kind of exception out of a major offence"⁴⁶⁶. He did not like "a thing to be at once murder and something else for which you can try a person if you are so disposed"⁴⁶⁷ and felt that the bill's approach was preferable: in these circumstances "the crime is extenuated"⁴⁶⁸.

Following the objection to partial codification expressed by the Select Committee⁴⁶⁹, Stephen J. began preparing the Criminal Code (Indictable Offences) Bill, 1878⁴⁷⁰. However, Blackburn J. had his way when Stephen J's. provision on infanticide, section 138, was deleted and replaced by sections 185 and 186⁴⁷¹. The first declared that every woman should be guilty of an indictable offence punishable with penal servitude for life, who, being with child and about to be delivered, with the

⁴⁶⁰ B.P.P.1874, Vol. ix p.497

⁴⁶¹ ibid p.516

⁴⁶² ibid pp.549 & 560

⁴⁶³ ibid p.521

⁴⁶⁴ ibid

⁴⁶⁵ ibid

⁴⁶⁶ ibid p.543

⁴⁶⁷ ibid

⁴⁶⁸ ibid

⁴⁶⁹ B.P.P.1874, Vol. ix p.477 pp.(ii) and (iv)

⁴⁷⁰ B.P.P.1878-9, Vol. xx p.169

⁴⁷¹ ibid p.270

intent that the child should not live, neglected to provide reasonable assistance in the delivery, if the child died immediately before, during, or shortly after birth, unless she proved that such death was not caused either by such neglect or by any wrongful act to which she was a party. The second created a similar, but minor offence punishable with seven years' penal servitude, in which the omission to obtain assistance was connected with an intent to conceal the fact of her having a child and which resulted either in the death of, or permanent injury to the child⁴⁷². One of the Commissioners' stated reasons for substituting sections 185 and 186 was their belief that these new provisions would often afford a means of punishing child-murder where there would be practical difficulty in obtaining a conviction of murder because of the necessity of proof of live-birth⁴⁷³. The Criminal Code of 1878 was consigned to the Parliamentary shelves where it died a dusty death.

In 1880 another Criminal Code Bill was introduced by a group of private members which proposed that a woman who intentionally did an unlawful act from which the death of her child resulted, either in the act of birth or immediately thereafter, being at the time deprived of her self-control by reason of physical or mental suffering or distress, should be punished as for manslaughter and that proof of live-birth was not to be necessary for conviction, the proof of dead-birth being placed on the woman. Bodily harm inflicted on the child within fourteen days of birth by its mother in such circumstances was to be punishable, if it resulted in death, by a maximum term of twenty years' penal servitude⁴⁷⁴.

That amelioration of the legal position with regard to infanticidal women remained a pressing concern was demonstrated in 1908, when Mr. George Greenwood introduced a Law of Murder Amendment Bill "to carry out the recommendations of the Royal Commission on Capital Punishment, 1866". It proposed to divide murder into two classes and specifically provided that no woman was to be indicted for killing her child at birth or within one month thereafter, but a woman who maliciously inflicted serious injury upon her child during that period, resulting in death, was to be

⁴⁷² ibid

⁴⁷³ stated in the marginal note to section 185

⁴⁷⁴ B.P.P.1880, Vol.ii pp.408 & 409

guilty of an indictable offence punishable with penal servitude, imprisonment, or detention during H.M's. pleasure⁴⁷⁵.

At the committee stage of the Children Bill, 1908 the Lord Chancellor, Lord Loreburn, moved to insert a clause to the effect that "where a woman is convicted of the murder of her infant and that child was under the age of one year, the Court may, in lieu of passing a sentence of death, sentence her to penal servitude for life or any less punishment"⁴⁷⁶. His main argument in support of it was that it would avoid the "solemn mockery" of pronouncing the death sentence in cases where it would not be carried out, a practice which was inhuman and contrary to public opinion⁴⁷⁷. He compared the Scottish position where a verdict of culpable homicide was returned in this kind of case, with the English position where juries took refuge in verdicts of concealment of birth⁴⁷⁸, presumably to illustrate that the position in Scotland was preferable, although adoption of diminished responsibility in its entirety does not seem to have occurred to him. In his opinion the English practice and the refusal of witnesses to give evidence in these cases, obstructed the administration of justice in England⁴⁷⁹. However, the Lord Chief Justice, Lord Alverstone, doubted the propriety of dealing with infanticide within the Children Bill which related to the protection of children⁴⁸⁰, envisaging that the clause as it stood would lead to an increase in the worst kind of child murders⁴⁸¹. His main objection was that this discretion should be left to the Executive rather than be vested in the Judiciary⁴⁸². The result would be "hanging judges and non-hanging judges"⁴⁸³. The clash between the two lawyers prompted the Bishop of Southwark to suggest that if the Lord Chief Justice did not like the Lord Chancellor's proposal he should take some other action himself⁴⁸⁴.

⁴⁷⁵ B.P.P.1908, Vol.ii p.74; B.P.P. 1909, Vol.iii p.426

⁴⁷⁶ B.P.Deb.1908, Vol.195 p.1178

⁴⁷⁷ *ibid*

⁴⁷⁸ B.P.Deb.1908, Vol.196 p.485

⁴⁷⁹ *ibid*

⁴⁸⁰ B.P.Deb.1908, Vol.195 p.1179

⁴⁸¹ B.P.Deb.1908, Vol.196 p.486

⁴⁸² B.P.Deb.1908, Vol.195 p.1179

⁴⁸³ B.P.Deb.1909, Vol.196 p.486

⁴⁸⁴ *ibid* p.487

Thus Lord Alverstone was more or less trapped into introducing a bill of his own⁴⁸⁵, the Child Murder (Record of Sentence of Death) Bill, 1909. His bill would have restored the judges' discretion to record the death sentence in cases of child murder⁴⁸⁶. Lord Loreburn objected on the ground that the bill would make no difference to the present state of the law⁴⁸⁷. The death penalty would still hang over the prisoner unless the prerogative of mercy was exercised⁴⁸⁸, the only difference being that the "sad pageant" of passing the death sentence in open court would be dispensed with⁴⁸⁹. Consequently, the same influences would continue to operate on witnesses and juries, with the knowledge that capital punishment remained⁴⁹⁰. In committee, Lord James who could find "no cause for enthusiastic support of the Bill"⁴⁹¹, moved an amendment to provide that if a mother who had not recovered from the effects of child-birth killed her infant, the judge could direct the jury that they might acquit of murder and convict of manslaughter⁴⁹². Lord Alverstone surrendered and accepted this amendment⁴⁹³. Lord Ashbourne then moved an amendment which, in addition to the disturbances of childbirth, would take account of such circumstances as the desertion of the father, expulsion from her family, unemployment, sickness and destitution⁴⁹⁴. In such cases the judges could direct a verdict of manslaughter if they considered that course proper, having regard to all the circumstances of the case. Lord Alverstone objected to vesting such a wide discretion in the judges⁴⁹⁵, but Lords Loreburn⁴⁹⁶ and James⁴⁹⁷ agreed with the substance of the amendment, the latter remarking that, in fact, the judges did exercise such discretion as they advised the Home Office on all questions of reprieve⁴⁹⁸. The amendment was withdrawn for reconsideration before the report stage and that was the last that was heard of it. The bill finally reached the Commons in July, when they were already in difficulties with

⁴⁸⁵ N.Walker op cit p.130

⁴⁸⁶ H.L.Deb.1909, Vol.1 p.638

⁴⁸⁷ ibid p.725

⁴⁸⁸ ibid

⁴⁸⁹ ibid

⁴⁹⁰ ibid

⁴⁹¹ ibid p.727

⁴⁹² ibid p.957

⁴⁹³ ibid p.959

⁴⁹⁴ ibid p.960

⁴⁹⁵ ibid pp.961 & 962

⁴⁹⁶ ibid p.963

⁴⁹⁷ ibid pp.962 & 963

their timetable and it was probably a lack of Parliamentary time which prevented it from proceeding further⁴⁹⁹.

Thirteen years later Mr.Arthur Henderson, secretary of the Labour Party, introduced the Child Murder (Trial) Bill⁵⁰⁰ which closely resembled its predecessor of 1909. However this bill left it open to the jury to bring in a verdict of manslaughter instead of murder (whenever evidence was given that at the time of the killing the woman "had not recovered from the effect of giving birth to the child") instead of leaving it to the judge's discretion whether or not to leave this decision to them. In the House of Lords Lord Phillimore expressed the view that the earlier proposals on infanticide had approached the problem in the wrong way⁵⁰¹. He stated that the judges felt a strong aversion to the placement of this issue in their hands, being of the view that it was for the jury, under proper direction, to find the crime and for the judge to award the proper punishment⁵⁰².

Although it was no wider than the principle on which the Home Secretary was using the prerogative of mercy⁵⁰³ the Lord Chancellor, Lord Birkenhead, condemned it as "almost terrifying" in its lack of particularity⁵⁰⁴. He warned that the provision might appear to reflect on the jury's right to return a manslaughter verdict in any case and objected to the absence of a time limit on the operation of the defence; a woman might not recover from the physical consequences of giving birth to a child for as many as nine years⁵⁰⁵. Finally, there was nothing to connect the fact that the woman had not recovered from the effect of giving birth to the child with the commission of the offence⁵⁰⁶, with no requirement that her will power, judgment of right and wrong or capacity of judging right from wrong should be impaired⁵⁰⁷.

⁴⁹⁸ D.Seaborne Davies op cit p.279

⁴⁹⁹ N.Walker op cit p.130

⁵⁰⁰ H.C.Deb.1922, Vol.150 pp.615 & 616

⁵⁰¹ H.L.Deb.1922, Vol.50 p.438

⁵⁰² ibid pp.438 & 439

⁵⁰³ N.Walker op cit p.130

⁵⁰⁴ H.L.Deb.1922, Vol.50 p.760

⁵⁰⁵ ibid p.440

⁵⁰⁶ ibid pp.440 & 441

⁵⁰⁷ ibid p.441

As a result he moved an amendment⁵⁰⁸ which he had drafted and which had the approval of the D.P.P. and the law officers of the Crown, which restricted the scope of the bill to those cases "where a woman unlawfully by any direct means intentionally causes the death of her newly born child, but at the time..had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was disturbed". In such cases the jury were enabled to find her guilty of infanticide, for which the woman could be sentenced as if she were guilty of manslaughter. Following objections from Lords Parmoor⁵⁰⁹ and Phillimore⁵¹⁰ the bill was amended and the resulting Infanticide Act, 1922 ran

"Where a woman by any wilful act or omission causes the death of her newly-born child, but at the time of the act or omission she had not fully recovered from the effect of giving birth to such child, and by reason thereof the balance of her mind was then disturbed, she shall, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, be guilty of felony, to wit, of infanticide."

The limitations of the defence became obvious when in 1927, a woman named **O'Donoghue** who had killed her thirty-five-day-old infant, was not allowed to avail of the partial defence of infanticide since the child could not be said to be "newly-born"⁵¹¹.

The Infanticide Bill of 1936 was a bold attempt to widen the scope of this legislation to correspond more closely both with public feeling and with the Home Secretary's use of the prerogative of mercy⁵¹². Introduced by a number of Labour back-benchers, it would have exempted the killing of infants up to the age of eight years from the death penalty and would have widened the definition of an infanticidal

⁵⁰⁸ ibid p.758

⁵⁰⁹ ibid pp.762-764

⁵¹⁰ ibid p.766

⁵¹¹ *R v O'Donoghue* (1927) 20 Cr.App.R.132

⁵¹² N.Walker op cit p.132

mother's state of mind to cover "mothers who commit acts of this kind under extreme stress arising from other causes than the immediate effects of childbirth"⁵¹³. Following the abdication of the King the bill lapsed. The Home Secretary and Lord Chancellor, who saw "a number of difficulties" in amending the 1922 Act, would promise no Government legislation for this purpose⁵¹⁴.

Finally Lord Dawson successfully introduced a bill which became the Infanticide Act of 1938. It made clear that the child could be of any age under twelve months and that the woman's mental imbalance was to be attributable either to the birth of the child or to the consequent lactation⁵¹⁵. Although the bill received unanimous support in House of Lords, the extension of the mitigatory effects of infanticide to cover the killing of children under the age of one year caused controversy, some commentators feeling that it was too broad and others feeling that it was too narrow.

At the committee stage, Lord Arnold stated⁵¹⁶ that he would like the time limit to be longer and would like the causes which could justify a verdict of infanticide to be extended so as to cover "mental disturbance due to distress and despair arising from solicitude for the child and extreme poverty, or either of these" but in the end he refrained from putting these amendments down because of the difficulty of passing a bill of this kind which was not a Government measure. The bill received the Royal assent on 23/6/1938 and remains to this day the law on infanticide.

Although commentators speak of infanticide as a substantive offence⁵¹⁷ it may also be viewed as a partial defence to murder. Walker, who describes infanticide as a crime⁵¹⁸, goes on to describe it as "a crime which was expressly equated with manslaughter. It was an intermediate verdict of the same nature as that which was

⁵¹³ H.C.Deb.1936-7, Vol.318 p.236

⁵¹⁴ H.C.Deb.1937, Vol.322 p.1165

⁵¹⁵ H.L.Deb.1937-8, Vol.108 p.295

⁵¹⁶ ibid p.603

⁵¹⁷ D.Seaborne Davies op cit p.281

⁵¹⁸ N.Walker op cit p.125

introduced thirty-five years later under the name of "diminished responsibility"⁵¹⁹. Parallels with the Scottish defence of diminished responsibility can be seen in the origin of the defence of infanticide in the use of the prerogative of mercy to secure release from the death penalty and both defences can be regarded as the handwork of the Judiciary. Edwards describes the Scottish defence of diminished responsibility as "a classic example of judge-made law"⁵²⁰ while Seaborne Davies says of infanticide:

"If any legislation could be described as above all others the creation of the Judges, it is the Infanticide Act, 1922. Their evidence against "the solemn mockery" in 1866 really marks the starting point of this reform; it was they who frequently made proposals for the amendment of the law during the next two decades; it was they who revived the whole question in 1908 and 1909; it was they who mostly discussed in Parliament the proposals of the Bill of 1922 after it had been cast into more or less its final form by Lord Birkenhead and his collaborators"⁵²¹.

The above discussion is a vivid illustration of the law's preoccupation with women who killed their children. The tentative gropings for a satisfactory solution resulted in the Infanticide Acts of 1922 and 1938. In line with the Scottish defence of diminished responsibility, infanticide evolved into a partial defence, reducing murder to manslaughter and it also hinges on the requirement of a mental imbalance. The Infanticide Act 1922 was the first step taken to introduce diminished responsibility into English law and the adoption of a full defence of diminished responsibility in 1957 was, therefore, a natural progression.

⁵¹⁹ ibid p.134

⁵²⁰ J.L.I.J. Edwards "Diminished Responsibility: A Withering Away of the Concept of Criminal Responsibility" in G.O.Mueller *Essays in Criminal Science* (London, 1961) p.302

⁵²¹ D.Seaborne Davies op cit p.220

2.2.2 Diminished Responsibility Imported

As stated above, the vesting of discretion in the jury to decide between capital and non-capital cases had been advocated by a minority of the 1866 Royal Commission on Capital Punishment. Only one proponent, however, linked it to a reduction of murder to culpable homicide. Stephen J. offered no evidence on the subject. By the time he wrote his *History of the Criminal Law of England* however, Stephen J., discussing cases in which self-control was weakened by insanity, was suggesting⁵²²

"the law ought..where madness is proved, to allow the jury to return any one of three verdicts: Guilty; Guilty, but his power of self-control was diminished by insanity; Not guilty on the ground of insanity".

No notice was taken of his suggestion however, and the Atkin Committee and the two medical associations which gave evidence to it in 1922 seem not to have considered it⁵²³.

By the time of the Royal Commission on Capital Punishment (1949-53) the British Medical Association was recommending not only the enlargement of the McNaghten Rules to cover irresistible impulse but also that the jury should be empowered to return a verdict of "guilty with diminished responsibility" if they found that the accused

"at the time of the committing of the act was labouring, as a result of disease of the mind, under a defect of reason or a disorder of emotion to such an extent as not to be fully accountable for his actions"⁵²⁴.

The Association recommended detention in a special institution for an indeterminate period where such a verdict was returned, rather than a fixed term of

⁵²² J.Fitzjames Stephen *A History of the Criminal Law of England* Vol.ii (London, 1883) p.175

⁵²³ N.Walker op cit p.147

⁵²⁴ Report of the Royal Commission on Capital Punishment (1949-53) op cit para.407

imprisonment as in Scotland⁵²⁵. Their recommendation was based on a recognition of the gradation of intermediate states between full knowledge and complete lack of knowledge and that

"no revision of the McNaughten formula can completely solve the problem of determining responsibility for crime unless it is made possible for the defence in the English courts, as in the Scottish courts, to set up, as an alternative to the plea of insanity, a plea of diminished responsibility"⁵²⁶.

Although the British Medical Association's proposal was also supported by the Scottish psychiatrists, the Institute of Psychoanalysis and Lord Denning⁵²⁷, the majority of witnesses were against its introduction⁵²⁸, the psychiatrists on the grounds that it would place too much responsibility on medical witnesses and would give rise to conflicting testimony which could confuse the jury. Sir John Anderson thought that it would be hard to draft a statutory definition of diminished responsibility and that in any case the use made of it in Scotland between the wars had weakened the deterrent effect of capital punishment (an argument for which he did not offer any evidence)⁵²⁹.

Although the Commission recognised that "no clear boundary can be drawn between responsibility and irresponsibility"⁵³⁰ and saw no reason to apprehend that juries would find the issue too difficult or would take refuge in it unreasonably⁵³¹, they concluded that

"although the Scottish doctrine of "diminished responsibility" works well in that country, we are unable to recommend its adoption in England"⁵³².

⁵²⁵ ibid

⁵²⁶ ibid para.408

⁵²⁷ ibid para.409

⁵²⁸ ibid para.410

⁵²⁹ N.Walker op cit p.148

⁵³⁰ Report of the Royal Commission on Capital Punishment (1949-53) op cit para.411

⁵³¹ ibid para.412

⁵³² ibid p.276

Their argument was that the conditions which gave rise to diminished responsibility were relevant to offences other than murder⁵³³. As their terms of reference were restricted to the law of murder they did not think "that so radical an amendment of the law of England would be justified for this limited purpose"⁵³⁴. Some writers have interpreted this to mean that they advocated its introduction in relation to all offences⁵³⁵. This view may have arisen from the argument of Scottish witnesses that diminished responsibility was part of the general law of Scotland⁵³⁶. Instead, the Commission recommended that juries should be able to decide between life and death sentences, taking into account extenuating circumstances such as the mental state of the murderer.

It is important to know that the Government resorted to the appointment of the Royal Commission on Capital Punishment amidst growing agitation for abolition of the death penalty. However, the Commission was specifically forbidden by its terms of reference from considering the question of abolition and was therefore limited to considering how the law could be improved given that the death penalty persisted. The Gowers Commission's report was likely to be ignored since, as is well known, the appointment of a Royal Commission is a time-honoured device, used by all Governments, when they wish to fend off opposition and at the same time do nothing⁵³⁷. Not surprisingly, therefore, Mr.Lloyd George announced on 10/11/1955 that the Conservative Government rejected all the main recommendations of the Gowers Commission and would introduce no amending legislation to the law of murder⁵³⁸.

The Government's unwillingness to propose any legislation prompted a group of their supporters to take the initiative. The Inns of Court Conservative and Unionist

⁵³³ ibid para.413

⁵³⁴ ibid

⁵³⁵ eg.T.B.Smith "Diminished Responsibility" [1957] Crim.L.R.354 p.355 and D.W.Elliott "The Homicide Act, 1957" [1957] Crim.L.R.282 p.283

⁵³⁶ N.Walker op cit p.149

⁵³⁷ C.Hollis *The Homicide Act* (London, 1964) p.21

⁵³⁸ H.C.Deb.1955-6, Vol.545 written answers p.219

Society appointed a committee of barristers and legally qualified M.P's. to take the initiative under the chairmanship of Sir Lionel Heald. The Heald Committee produced a short report⁵³⁹ which recommended changes in the law regarding provocation, constructive malice, accomplices and the defence of insanity in trials for murder. Over the last of these they seem to have had great difficulty⁵⁴⁰. They sought advice from Dr. Max Grunhut, the Oxford Criminologist, who was disposed in favour of the defence of diminished responsibility, and after listening to his advice the Heald Committee consulted the Scottish Lord Advocate, W.R. Milligan Q.C.⁵⁴¹. The Heald Committee rejected the Gowers Commission's recent proposal to allow the jury to decide whether or not the accused was suffering from disease of the mind (or mental deficiency) to such a degree that he ought not to be held responsible⁵⁴² and instead, recommended the adoption of the Scottish expedient so far as murder was concerned, pointing out that it was no innovation to provide a special defence which was confined to a specific crime⁵⁴³. They followed this with the recommendation that the result of a diminished responsibility verdict should be detention during Her Majesty's pleasure⁵⁴⁴.

The Government, fearing that if it remained obstinate it would be defeated by the abolitionists whose cause was attracting an increasing number of Conservatives, decided to throw its support behind the Heald Committee's recommendations⁵⁴⁵.

The Government published its Homicide Bill later in the year, section 2 of which provided that

"Where a person kills or is a party to the killing of another he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded

⁵³⁹ *Murder: Some Suggestions for the Reform of the law Relating to Murder in England* (London, 1956)

⁵⁴⁰ N. Walker op cit p.149

⁵⁴¹ ibid

⁵⁴² Report of the Heald Committee *Murder: Some Suggestions for the Reform of the law Relating to Murder in England* op cit p.15

⁵⁴³ ibid p.17

⁵⁴⁴ ibid p.19

⁵⁴⁵ C. Hollis op cit p.49

development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing".

The words bracketed closely resemble the words of the definition of "mental defectiveness" in the Mental Deficiency Act 1927 - "arrested or incomplete development of mind existing before the age of 18 years". The 1927 Act however, seems to mean "however arising or caused" whilst the 1957 parenthesis is intended for the purpose of limitation rather than the avoidance of doubt⁵⁴⁶.

The following subsections of the Homicide Bill provided that it was for the defence to raise this issue, and if successful in doing so, the accused became liable to be convicted of manslaughter. The effect of this (which was not stated in the bill) would be to free the judge from the necessity of pronouncing the death sentence (or life imprisonment if the murder belonged to the newly created category of "non-capital murder") and to allow him a choice between life imprisonment, imprisonment for a specified term, a fine, a probation order, or an absolute or conditional discharge⁵⁴⁷. If the necessary medical evidence were forthcoming at the stage when he was considering sentence he could commit him to a mental hospital, but was not compelled to do so as he would have been by a verdict of "guilty but insane"⁵⁴⁸.

The attempts to amend this clause during its passage through Parliament were not very determined, and the Attorney General and Lord Chancellor successfully resisted them⁵⁴⁹. At the committee stage in the House of Commons Mr.Silverman, who throughout took the leadership of the abolitionist members in the House of Commons⁵⁵⁰, proposed that the phrase should be amended so as to read "abnormality of mind (however arising)"⁵⁵¹ so that the law could keep abreast of advances in

⁵⁴⁶ E.Griew "The Future of Diminished Responsibility" [1988] Crim.L.R.75 p.77

⁵⁴⁷ N.Walker op cit p.150

⁵⁴⁸ ibid

⁵⁴⁹ ibid

⁵⁵⁰ C.Hollis op cit p.22

⁵⁵¹ H.C.Deb.1956, Vol.561 p.314

medical knowledge⁵⁵². He himself gave no clear example of the sort of case which might otherwise be excluded, but his supporters instanced people who were partners in suicide pacts, or who were merely "simple" or irresponsible⁵⁵³ without suffering from "arrested or retarded development of mind". Pointing out that Mr.Silverman's amendment would include murderers who were merely bad-tempered or who committed a murder as a result of an outburst of rage or jealousy⁵⁵⁴, the Attorney General stipulated that the chosen wording was intended "to bring English law into line with the Scottish doctrine, and not to go further than that"⁵⁵⁵ and in the end the amendment was not accepted.

Another unsuccessful proposal of the abolitionists would have shifted the onus of proof from the defendant to the prosecution⁵⁵⁶, a move which has more recently been advocated by both the (Butler) Committee on Mentally Abnormal Offenders⁵⁵⁷ and by the Criminal Law Revision Committee⁵⁵⁸. Its proponent Mr.Paget (M.P.for Northampton) stipulated that he wished to correct the anomaly of insanity, rather than add to it by putting diminished responsibility into the same category⁵⁵⁹ and he pointed out that McNaghten's case was "rather a slim foundation on which the doctrine was built"⁵⁶⁰. The reasons advanced in favour of this amendment were firstly, the convenience which would result if the onus was on the prosecution, as these are the people who have the evidence, the defendant being under constant observation in the prison hospital and secondly, the difficulty for defence counsel in obtaining instructions from a madman⁵⁶¹. The Attorney General countered Mr.Paget's first argument by asserting that the prosecution make evidence of insanity available to the defence⁵⁶². He claimed that the proposal would add considerably to the length of all

⁵⁵² ibid p.316

⁵⁵³ eg.Mr.Rees-Davies ibid pp.324 & 330

⁵⁵⁴ ibid pp.320 & 321

⁵⁵⁵ ibid p.321

⁵⁵⁶ Mr Paget, ibid p.353

⁵⁵⁷ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 (London, 1975)
paras.18.39-18.41

⁵⁵⁸ Criminal Law Revision Committee 14th Report *Offences Against the Person* Cmnd 7844 (London, 1980) para.914

⁵⁵⁹ H.C.Deb.1956, Vol.561 p.354

⁵⁶⁰ ibid p.407

⁵⁶¹ ibid p.408

⁵⁶² ibid p.417

trials, would amount to a radical change in our criminal administration and would be a change difficult to confine solely to murder charges⁵⁶³. He also pointed out that the defendant in a murder case may not wish to put forward a plea of insanity or diminished responsibility⁵⁶⁴ and that such a change would prejudice the defence⁵⁶⁵. The amendment having failed, Sir Frank Soskice (M.P. for Newport) moved to leave out "prove" and insert "satisfy the jury"⁵⁶⁶ to indicate that the burden of proof was on a balance of probability⁵⁶⁷. The Solicitor General made clear that this was what was intended by "prove"⁵⁶⁸ and again this amendment failed.

Considerable discontent was expressed in the House of Commons at the Government's determination to rush this piece of legislation through, in advance of a more far-reaching proposal on capital punishment⁵⁶⁹. Mr. Anthony Greenwood (M.P. for Rossendale) expressed the view that

"It is becoming more and more obvious that the Government have not been motivated by a burning passion to amend the law, but rather with a determination to ditch [Mr. Silverman]. From some of the answers we have had to our queries, it seems obvious that the Government embarked upon the Bill with as little preparation and with as reckless a disregard of the results as in the case of a much graver enterprise that the Government have undertaken"⁵⁷⁰.

Similarly, Mr. Paget claimed that

⁵⁶³ p.410

⁵⁶⁴ ibid p.415

⁵⁶⁵ ibid p.416

⁵⁶⁶ ibid p.453

⁵⁶⁷ ibid p.455

⁵⁶⁸ ibid p.456

⁵⁶⁹ eg Mr Silverman ibid p.469

⁵⁷⁰ ibid p.489

"the Clause is not nearly as good as it might be or as good as it would be if the Government were dealing with this matter with any measure of sincerity"⁵⁷¹.

Partly because of the haste with which the bill was rushed through and the consequent lack of discussion of it, many M.Ps. were left in the dark as to the working of the section. Mr.Greenwood expressed the view that

"the Bill is just as far from clear to many of us who have been considering it for that considerable length of time"⁵⁷²

while Mr.Silverman expressed disquiet that the proposed amendment on burden of proof

"should ultimately be decided by votes cast one way or the other by hundreds of people who have not the slightest notion what question they are deciding, still less what are the arguments on either side"⁵⁷³.

Mr.Silverman was also of the opinion that this was a matter which should be decided by a free vote rather than according to the collective political philosophy of each party⁵⁷⁴. No doubt the general ignorance of this area of law and the fact that this was a party issue contributed to the M.Ps'. failure to attend the debates. Fewer than a half dozen members on either side were present on 27/11/1956⁵⁷⁵.

In the House of Lords, similar discontent was expressed at the Government's motives and actions⁵⁷⁶. Lord Chorley moved two amendments, the first being to insert "environmental" after "inherent" and the second to insert "or disorder of the mind"

⁵⁷¹ ibid

⁵⁷² ibid

⁵⁷³ ibid p.442

⁵⁷⁴ ibid

⁵⁷⁵ An observation by Mr Hale ibid p.425

⁵⁷⁶ H.L.Deb.1956-7, Vol.201 Lord Silkin pp.1176 & 1177 and Lord Chorley p.1207

after "disease"⁵⁷⁷, the object being to include cases of diminished responsibility produced by external and environmental causes without disease⁵⁷⁸. However the Lord Chancellor, Lord Kilmuir, noted that the proposed amendments would go beyond the Scottish defence⁵⁷⁹, and Lord Chorley withdrew his amendment⁵⁸⁰. Lord Chorley also moved an amendment which would have made detention during H.M's. pleasure the automatic result of a successful defence under this clause⁵⁸¹. His object was to eliminate the possibility of a fixed sentence, after two thirds of which, a man could claim his freedom although he might still be regarded by the authorities as dangerous. This was rejected by Lord Kilmuir, the Lord Chancellor, on the grounds that there would also be cases in which the accused had virtually recovered by the time of trial⁵⁸² and in which it would be unduly severe to deprive the judge of discretion. After the Lord Chancellor asserted his faith in the judges to give appropriate sentences⁵⁸³ Lord Chorley withdrew his amendment⁵⁸⁴.

The act received the Royal assent on 21/3/1957. The new Home Secretary, Mr. Butler, hailed the bill as a victory for the forces which represented majority opinion in the country⁵⁸⁵. There was not, in fact, the slightest support for such a contention⁵⁸⁶. All the evidence showed that public opinion was overwhelmingly either retentionist or abolitionist and that those who supported some middle position of grading murders were few in number, and expert opinion such as the Gowers Commission, had, whenever it had examined these proposals, decided that they were impracticable⁵⁸⁷. In fact there was nobody who favoured such a law on its own merits. The very Government which passed it had declared itself against it only two months before⁵⁸⁸. As Lord Templewood opined in the debate in the House of Lords, it was "nothing more than an expedient to extricate the Government out of a very difficult

⁵⁷⁷ H.L.Deb.1956-7, Vol.202 p.255

⁵⁷⁸ ibid pp.356 & 357

⁵⁷⁹ ibid p.358

⁵⁸⁰ ibid p.362

⁵⁸¹ ibid p.362

⁵⁸² ibid p.365

⁵⁸³ ibid p.366

⁵⁸⁴ ibid p.368

⁵⁸⁵ H.C.Deb.1956-7, Vol.564 pp.454-457

⁵⁸⁶ C.Hollis op cit p.55

⁵⁸⁷ ibid pp.55 & 56

⁵⁸⁸ ibid p.56

position"⁵⁸⁹. However, as Hollis comments⁵⁹⁰, the right thing can be done for the wrong reasons;

"The motive for which the Act was passed is one thing. But, whatever its motive, we must examine objectively how it has worked. Parliament might have passed a wise act by a happy accident. Such things have happened before"⁵⁹¹.

2.3 THE OPERATION OF THE DEFENCE OF DIMINISHED RESPONSIBILITY

As shown above, the introduction of diminished responsibility was a half-hearted response by the Government of 1956 to the growing pressure for abolition of the death penalty. The perfunctory discussion of the defence's terms and the haste with which the bill was rushed through were later to lead to uncertainty as the precise scope of the defence. As a result, it fell on the Judiciary to imbue the words of the defence with meaning (impaired mental responsibility, for example, is not a term of art in law or psychiatry) and to delineate its precise scope. By tracing the development of the defence I will show that the introduction of diminished responsibility into English law has, nonetheless, abated the controversy surrounding the insanity defence and led to a resolution of the medico/legal conflict.

At first it was unclear whether the Crown could accept the plea of diminished responsibility where the psychiatric evidence was unanimous or whether the issue had to be left to the jury. The early cases⁵⁹² indicate that the courts initially favoured the second option⁵⁹³ and insisted that the prosecution was obliged to probe the soundness

⁵⁸⁹ H.L.Deb.1956-7, Vol.201 p.1196

⁵⁹⁰ C.Hollis op cit p.56

⁵⁹¹ ibid

⁵⁹² In *Matheson* (1958) 42 Cr.App.R.116 the Court of Appeal decided that pleas of guilty to manslaughter under section 2 of the Homicide Act were not to be accepted by trial judges and that the issue had to be put to the jury even if the prosecution agreed that the defendant's responsibility was diminished and had no rebutting evidence to offer.

⁵⁹³ F.McAuley op cit p.160

of the psychiatric evidence in cross examination⁵⁹⁴. Then in Cox⁵⁹⁵, the Court of Appeal approved the procedure whereby the plea of diminished responsibility could be accepted at the discretion of the trial judge where the medical evidence was uncontested. Now if at a diminished responsibility manslaughter trial there is unanimous psychiatric evidence from both sides or uncontradicted medical testimony (likely to come from the defence only)⁵⁹⁶ that the defendant was of diminished responsibility, either the case must not go to the jury or the trial judge must direct the jury to find a manslaughter verdict under section 2 of the Homicide Act unless there "be some evidence arising from other testimony or the circumstances of the case upon which [the jury] can properly act" to convict of murder⁵⁹⁷.

Walker found that as long ago as 1964, there was no prosecution rebuttal of the psychiatric evidence for the defence in 75% of section 2 manslaughter cases⁵⁹⁸. Dell's research has shown that for the period of 1976/1977, the plea not guilty to murder but guilty to section 2 manslaughter was accepted by the prosecution in 86.5% of such cases⁵⁹⁹; the result was that 80% of diminished responsibility cases were dealt with by guilty pleas⁶⁰⁰. Thus, in the vast majority of diminished responsibility cases, the prosecution and the court accord deference to the medical viewpoint of abnormality of mind and impaired mental responsibility. Deference to the medical viewpoint of abnormality of mind can also be seen in the wide array of abnormalities covered by section 2, which the remainder of this chapter will be devoted to discussing. The implications of the practice of yielding to the medical viewpoint of substantially impaired mental responsibility will be analysed in Chapter Three.

There is no compulsion on the jury, despite medical concurrence, to find that responsibility is diminished, since the jury has to reach its verdict on all the facts and

⁵⁹⁴ *R v Din* (1962) 42 Cr.App.R.116

⁵⁹⁵ [1968] 1 All.E.R.386 at p.387

⁵⁹⁶ S.Spencer "Homicide, Mental Abnormality and Offence" in *Mentally Abnormal Offenders* (Toronto, 1984) p.97

⁵⁹⁷ *R v Vernage* [1982] Crim.L.R.598 p.599

⁵⁹⁸ N.Walker op cit p.161

⁵⁹⁹ S.Dell *Murder into Manslaughter* (Oxford, 1984) p.26

⁶⁰⁰ ibid p.28

circumstances of the case, not just the medical evidence⁶⁰¹. In R v Dix⁶⁰² it was argued that by the same token upon which a jury could overturn medical evidence if there was sufficient evidence to convict of murder, a jury could be asked to convict of section 2 manslaughter without medical evidence if there was sufficient outside evidence of substantial mental abnormality.

Shaw L.J., while finding counsel's argument attractive and that the terms of section 2(1) of the Homicide Act, 1957 do not require that medical evidence be adduced in support of a defence of diminished responsibility, nevertheless upheld the trial judge's ruling that this subsection makes it a practical necessity⁶⁰³. Counsel's argument it was ruled, could hold up, only if the parenthesis in the subsection ("whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury") was descriptive of *all* forms of abnormality of mind so that psychiatric evidence as to what sort was unnecessary⁶⁰⁴. However, Lord Parker in Byrne⁶⁰⁵ had made it clear that the defendant must show not only the existence of abnormality of mind but also that it falls within the above parenthesis and is substantial⁶⁰⁶. Shaw L.J.'s. view was that what emerges from Lord Parker's statement is that scientific evidence of a medical kind "is essential" to establish what is referred to in the above parenthesis⁶⁰⁷. Hence a section 2 manslaughter defence without psychiatric evidence seems impossible⁶⁰⁸.

The remainder of this Chapter will be dedicated to discussing those abnormalities of mind which the psychiatric witnesses testify to and which lead to diminished responsibility manslaughter verdicts⁶⁰⁹. In this manner I will outline the parameters of the defence (which have taken a considerable length of time to be settled), with reference to several criminal law principles and defences. This will

⁶⁰¹ *Walton v R* [1978] 1 All E.R.542 p.543

⁶⁰² [1982] 74 Cr.App.R.306

⁶⁰³ *ibid* p.311

⁶⁰⁴ *ibid*

⁶⁰⁵ [1960] 3 All E.R.1

⁶⁰⁶ *ibid* p.4

⁶⁰⁷ *R v Dix* [1982] 74 Cr.App.R.306 p.311

⁶⁰⁸ S.Spencer op cit p.96

⁶⁰⁹ For an illustration of the medical conditions which typically give rise to diminished responsibility verdicts see Power "Diminished Responsibility" (1967) 7 Med. Sci.& L.185 p.187

reveal the evolution of a happy partnership between law and medicine on the issue of diminished responsibility and the success of the defence in dealing with cases of abnormality of mind which are regarded as falling outside the ambit of the McNaghten Rules but which nevertheless merit some form of excuse.

2.4 DIMINISHED RESPONSIBILITY AND IRRESISTIBLE IMPULSE

The focus of this section is the plea of irresistible impulse which, as I have shown in Chapter One, was frequently offered in cases of volitional and moral insanity during the nineteenth and early twentieth centuries. After 1910, however, the Court of Appeal came down heavy-handedly against any attempt to alter the McNaghten Rules and pronounced very firmly that irresistible impulses due to insanity would not be recognised by the English courts as a legal defence. Contemporaneous with the steadfast opposition shown by the English courts, a movement to recognise irresistible impulse as part of the test of insanity was initiated in Irish law. This eventually culminated with approval by the Irish Supreme Court in Doyle v Wicklow County Council⁶¹⁰, the shortcomings of which will be discussed further in Chapter Three. In contrast with the Irish position from the 1930's, pleas of irresistible impulse became less frequent in England, until eventually irresistible impulse was no longer offered as evidence of insanity. That the judicial opposition to irresistible impulse stemmed in large part from a conflict over the distribution of power between the legal and medical professions emerges from a lecture delivered by Lord Hewart in 1927 before the Medical Society of London where he said of the defence of irresistible impulse

"If the law were relaxed in the way which has been suggested..the result might be to transfer to a section of the medical profession the question whether a great number of ordinary criminals should be held responsible to the law"⁶¹¹.

⁶¹⁰ [1974] I.R.55

⁶¹¹ Excerpts of this lecture have been published by the Law Times (1927) Vol.164 p.384

By the 1950's the medical categories of moral and volitional insanity had gone out of vogue and been replaced by the "psychopathic personality". Similarities between moral insanity and psychopathy can be discerned from the report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency (1954-57), which described psychopaths as persons whose

"daily behaviour shows a want of social responsibility and of consideration for others, of prudence and foresight and of ability to act in their own best interests. Their persistent anti-social mode of conduct may include inefficiency and lack of interest in any form of occupation; pathological lying, swindling, and slandering; alcoholism and drug addiction; sexual offences, and violent actions with little motivation and an entire absence of self-restraint, which may go as far as homicide. Punishment or the threat of punishment influences their behaviour only momentarily, and its more lasting effect is to intensify their vindictiveness and anti-social attitude"⁶¹².

It was unclear at first whether the psychopath (ie. the characteristic victim of irresistible impulses⁶¹³) would be embraced by the diminished responsibility defence in the absence of some other recognised form of abnormality, such as mental subnormality (as in Matheson⁶¹⁴) or drunkenness (Di Duca)⁶¹⁵. After all, psychopathy is a personality disorder and the Homicide Act stressed *abnormality of mind*. Furthermore, the Scottish defence of diminished responsibility had by now become much more restrictive. In Carraher v H.M. Advocate⁶¹⁶ it was held by a Full Bench that

⁶¹² Report and Minutes of Evidence, 8th day, p.287, quoted by Wooton *Social Science and Social Pathology* (London, 1959) p.249

⁶¹³ J.L.I.J. Edwards "Social Defence and Control of the Dangerous Offender" [1968] C.L.P.23 p.48 instances this as one of the most frequently recorded symptoms of psychopathy.

⁶¹⁴ (1958) Cr.App.R.145

⁶¹⁵ (1959) Cr.App.R.167

⁶¹⁶ [1946] J.C.108

"the plea of diminished responsibility, which..is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions"⁶¹⁷

and that psychopathic personality disorder should henceforth, not be regarded as a species of diminished responsibility⁶¹⁸.

As early as 1909 Lord Guthrie in **H.M. Advocate v Edmonstone**⁶¹⁹ had stated, although *obiter*, that

"[t]he law has never countenanced the idea that persons with a diminished moral sense in consequence of having been brought up in bad surroundings can be dealt with differently from others"⁶²⁰.

More recently Lord Cooper in **H.M. Advocate v Braithwaite** stated

"it will *not* suffice in law, for the purpose of this defence of diminished responsibility merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self-control. The world would be a very convenient place for criminals and a very dangerous place for other people, if that were the law. It must be much more than that"⁶²¹

whilst the Lord Justice-General in **Caldwell v H.M. Advocate** asserted that

"[e]vidence of ruthlessness, of callousness and of disregard for others is evidence rather of a criminal disposition than of diminished responsibility"⁶²².

⁶¹⁷ ibid p.118

⁶¹⁸ ibid p.117

⁶¹⁹ (1909) 2 S.L.T.223

⁶²⁰ ibid p.224

⁶²¹ [1945] J.C.55 pp.57 & 58

⁶²² [1946] S.L.T.9

These words were still being quoted with approval in 1963 by Lord Wheatley in the case of Burnett⁶²³, a psychopathically hot-tempered man who murderously attacked both his mistress and her husband when they showed signs of becoming reconciled⁶²⁴.

It seemed likely that the English defence of diminished responsibility would follow the course pre-ordained for it by the Scottish case-law. The Attorney General had stipulated in the Parliamentary debates on the Homicide Bill, that the chosen wording of section 2 was intended "to bring English law into line with the Scottish doctrine, and not to go further than that"⁶²⁵. Spriggs⁶²⁶ gave the Court of Appeal its first opportunity to settle the issue. There prosecuting counsel contended that because the defendant had a high intelligence quotient he could not be suffering from an abnormality of mind despite medical evidence that the defendant lacked ability to control his emotions. In summing up, the judge gave no ruling as to these conflicting submissions but simply left it to the jury to say whether they were satisfied that the accused came within the statutory definition. It is quite likely that the jury were influenced by prosecuting counsel's contention when they convicted the accused. Nonetheless, the Court of Appeal, pursuing a course of non-interference as regards the terms of the Act, held that the trial judge had taken a proper course of action.

In Byrne the trial judge directed the jury as to the meaning of section 2 in substantially the same terms as those urged by counsel for the prosecution in Spriggs; that is, that difficulty or even inability of an accused person to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impaired his mental responsibility. The accused was a sexual psychopath who had strangled a young woman and then mutilated her body. On appeal, Lord Parker in the Court of Criminal Appeal ruled that "abnormality of mind" means

⁶²³ The Proceedings were reported only in the press

⁶²⁴ Details are given by N.Walker op cit p.156

⁶²⁵ H.C.deb 1956, Vol.561 p.321

⁶²⁶ [1958] 1 All E.R.300

"a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment. The expression "mental responsibility for his acts" points to a consideration of the extent to which the accused's mind is answerable for his physical acts which must include a consideration of the extent of his ability to exercise will-power to control his physical acts"⁶²⁷.

At last irresistible impulse was admitted into English law although *via* the defence of diminished responsibility. This route has led to one important difference. It is not necessary that the impulse on which the defendant acted should be found by the jury to be irresistible; it is sufficient if the difficulty which the defendant experienced in controlling it was substantially greater than would be experienced in like circumstances by an ordinary man, not suffering from mental abnormality⁶²⁸. This view has been approved in Simcox⁶²⁹ and Lloyd⁶³⁰. The result in Byrne is in keeping with the opinion of the Royal Commission on Capital Punishment (1949-53) which found⁶³¹ that

"since a psychopath would not ordinarily be held to suffer from a disease of the mind, or..from mental deficiency, it would not be open to the courts to find them irresponsible, either under the McNaghten Rules in their present form or if the law were amended in the way we have suggested..In our view, however, the available evidence justifies

⁶²⁷ [1960] 3 All E.R.1 p.4

⁶²⁸ Smith and Hogan (7th ed) (London, 1992) p.213

⁶²⁹ [1964] Crim.L.R.402 p.403

⁶³⁰ [1966] 1 All E.R.107 p.109

⁶³¹ Report of the Royal Commission on Capital Punishment 1949-53 op cit para.401

the conclusion that *in many cases the responsibility of psychopaths can properly be regarded as diminished*"(emphasis added).

Aware of the philosophical conundrum on which the defence of irresistible impulse had foundered, Lord Parker in Byrne acknowledged that

"there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses. These problems, which in the present state of medical knowledge are scientifically insoluble, the jury can only approach in a broad, common-sense way"⁶³².

Criticism on this ground quickly followed on the heels of Byrne, Lady Wooton arguing that it is not possible to get inside another man's skin to assess the strength of his impulses or his ability to have acted otherwise than as he did⁶³³. Wooton is of the view that the state of a man's knowledge or intellect is much more easily tested than the state of his will⁶³⁴ but as Hart points out⁶³⁵

"a man's knowledge is surely as much, or as little, locked in his breast as his capacity for self control. Questions about the latter indeed may often be more difficult to answer than questions about a man's knowledge; yet in favourable circumstances if we know a man well and can trust what he says about his efforts or his struggles to control himself we may have just as good ground for saying 'Well he just could not do it though he tried' as we have for saying 'He didn't know that the pistol was loaded'. And we sometimes may have good general evidence that in certain conditions, eg. infancy or a clinically definable state, such as depression after childbirth, human beings are unable or less able than the normal adult to master certain impulses".

⁶³² 3 All E.R.1 p.5

⁶³³ Lady Wooton *Crime and the Criminal Law* (2nd ed) (London, 1981) p.78

⁶³⁴ Lady Wooton *Social Science and Social Pathology*, op cit p.230

⁶³⁵ H.L.A.Hart *Punishment and Responsibility* (Oxford ,1968) p.203

Hart asserts that the philosophical arguments pitch the case too high: they are supposed to show that the question whether a man could have acted differently is in principle unanswerable and not merely that in law courts we do not usually have clear enough evidence⁶³⁶. In any event, the law's concern is with establishing "moral certainty" and not metaphysical certainty⁶³⁷. The difficulties arise from the nature of psychopathy which the Gowers Commission described as "one of the most obscure and intractable problems we have to consider"⁶³⁸. Although they felt "that the concept of psychopathic personality is a necessary and legitimate one"⁶³⁹ they acknowledged that "the question whether a psychopath should be regarded as criminally responsible for his actions is one of great difficulty"⁶⁴⁰.

This view is seconded by Lady Wooton who says that "the psychopath is a critical case for those who would retain a distinction between the responsible and the irresponsible..[and that].the psychopath makes nonsense of every attempt to distinguish the sick from the healthy delinquent by the presence or absence of a psychiatric syndrome, or by symptoms of mental disorder which are independent of his objectionable behaviour"⁶⁴¹. Surely this is an argument in favour of dealing with the psychopath *via* the defence of diminished responsibility which indicates reduced culpability, as opposed to through the medium of the insanity defence which signifies blamelessness and whose outcome is a technical acquittal. Further arguments in favour of this course of action are firstly, the fact that most psychiatrists view psychopathy as a personality disorder rather than as a mental illness and secondly, the fact that the Butler Committee has taken the view that it is non-curable⁶⁴² and therefore, that prison is a preferable receptacle to a mental hospital⁶⁴³.

⁶³⁶ ibid

⁶³⁷ H.Fingarette *The Meaning of Criminal Insanity* (Berkley, 1972) p.83

⁶³⁸ Report of the Royal Commission on Capital Punishment 1949-53 op cit para.394

⁶³⁹ ibid

⁶⁴⁰ ibid para.398

⁶⁴¹ Lady Wooton *Social Science and Social Pathology* op cit p.250

⁶⁴² Report of the (Butler) Committee on Mentally Abnormal Offenders, Cmnd 6244 op cit para.5.34

⁶⁴³ ibid para.5.38

After a brief flurry of discussion following Byrne, criticism of the admission of irresistible impulse waned. Over a century's conflict about the recognition of irresistible impulse as a species of insanity ended with one judgment. The Homicide Act and particularly the decision in Byrne appear to have effected a reconciliation between the legal and psychiatric conceptions of insanity. Norrie describes the acceptance of irresistible impulse as "an intellectual fudge between the legal and the psychiatric categories"⁶⁴⁴. The end result was "the partial acceptance of the psychiatric concept with regard to murder through the 1957 Act, albeit on the law's terms"⁶⁴⁵.

2.5 DIMINISHED RESPONSIBILITY AND THE DEFENCE OF AUTOMATISM

In Chapter One I have briefly dealt with the widening of the concept of disease of the mind in the McNaghten Rules in the interests of public protection. This has resulted in a restriction of the defence of automatism, which leads to an outright acquittal in the case of unconscious involuntary acts not attributable to disease of the mind within the Rules. The narrowing of the defence of automatism (to the point where its application is very limited) is an issue which requires further consideration. This will reinforce the unsatisfactory nature of the McNaghten Rules and the usefulness of the diminished responsibility plea in avoiding the stigma of an insanity label and indefinite incarceration (until recently the consequence of a finding of insanity in England, still the consequence in Ireland) in those cases which were once regarded as amounting to automatism.

The restriction of the defence of automatism began with R v Kemp⁶⁴⁶ where Lord Devlin ruled that arteriosclerosis (which in this case had not yet caused degeneration of the brain cells) was a disease of the mind as disease of the mind was not restricted to a disease of the brain, and insofar as the accused's condition affected

⁶⁴⁴ A. Norrie *Crime, Reason and History: A Critical Introduction to Criminal Law* (London, 1993)

p.182

⁶⁴⁵ ibid

⁶⁴⁶ [1956] 3 All E.R.249

the ordinary mental faculties of "reason, memory and understanding"⁶⁴⁷. This case was in marked contrast to the earlier approach of Barry J. in Charlson⁶⁴⁸ who allowed the jury to consider whether a brain tumour in the defendant caused a state of automatism, after he had hit his son on the head with a hammer and thrown him out of a window causing him serious injury.

Then in Bratty v A.G. for Northern Ireland⁶⁴⁹ Lord Denning disclosed the public protection role of the insanity defence, asserting that "any mental disorder 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 be given an unqualified acquittal"⁶⁵⁰. It appeared likely from this *dictum* that a mental condition would not qualify as McNaghten madness if it was not likely to recur, but the Court of Appeal in Burgess⁶⁵¹ has stated that absence of the danger of recurrence will not prevent a finding of disease of the mind within the McNaghten Rules.

Another criterion for distinguishing automatism from insanity has emerged out of the Court of Appeal decision in R v Quick and Paddison⁶⁵². There the first named defendant was tried for assault occasioning actual bodily harm on a patient in the hospital where he worked as a nurse. The trial judge ruled that his condition of hypoglycaemia (brought on by food abstinence and alcohol following an injection of insulin to treat his diabetes) could only support the defence of insanity and not automatism. Presumably this is because Quick had previously suffered several hypoglycaemic episodes, some of which had issued in violence. On appeal, the Court of Appeal held that disease of the mind within the McNaghten Rules did not include a malfunctioning of the mind of transitory effect caused by the application to the body of some *external* factor such as violence, drugs, anaesthetics, alcohol, hypnotic

⁶⁴⁷ ibid p.253

⁶⁴⁸ [1955] 1 All E.R.859

⁶⁴⁹ [1963] A.C.386

⁶⁵⁰ ibid p.412

⁶⁵¹ [1991] 2 All E.R.769

⁶⁵² [1973] Q.B.910

influences or insulin and that accordingly, the issue of automatism should have been left to the jury.

It should be noted that the Court of Appeal stated who were not to be treated as suffering from disease of the mind and did not suggest that the converse of this principle was an infallible pointer to those who were so suffering⁶⁵³. "To say that the presence of an external cause of mental trouble saves a man from the imputation of madness does not imply that the absence of an external cause necessarily means that he is mad"⁶⁵⁴.

2.5.1 Sleep-walking and epilepsy

However the Court of Appeal has recently confirmed in Burgess that there *is* an internal/external cause doctrine by ruling that the defendant's sleep-walking amounted to insanity because it arose from an internal cause and had manifested itself in violence, although it was unlikely to recur in the form of serious violence.

Although the extension of disease of the mind to cover sleep-walking had been anticipated⁶⁵⁵, it is a difficult proposition to accept in view of the fact that for years sleep-walking has been cited as a self-evident illustration of automatism. An example is Stephen J. in Tolson's case⁶⁵⁶ who asked " Can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing"⁶⁵⁷. In Bratty both Lord Denning⁶⁵⁸ and Lord Morris of Borth-Y-Gest⁶⁵⁹ referred to sleep-walking as an example of automatism.

⁶⁵³ Glanville Williams *Textbook of the Criminal Law* (2nd ed.) (London, 1983) pp.674 & 675

⁶⁵⁴ ibid p.675

⁶⁵⁵ By Glanville Williams ibid p.665

⁶⁵⁶ *R v Tolson* (1889) 23 Q.B.D.168

⁶⁵⁷ ibid p.187

⁶⁵⁸ [1963] A.C.386 p.409

⁶⁵⁹ ibid p.415

Furthermore, a defence of automatism based on evidence of sleep-walking has succeeded in several earlier English cases. In 1936 Stone was acquitted of an offence against a girl who lived in his house, on the grounds that he was asleep⁶⁶⁰. In 1949 a soldier, Price, attacked his corporal with a bayonet while awaking from a dream and was acquitted⁶⁶¹. In 1951 Paltridge, who tried to strangle his wife and then hit her with an axe while asleep, was acquitted after a mere ten minutes deliberation by the jury⁶⁶². More significantly, Sergeant Boshears was acquitted of the murder of a young girl on the grounds of automatism caused by sleep-walking⁶⁶³. As late as 1978 Hughes was acquitted on the same grounds after she had risen in the night while still asleep, to fetch a knife to peel potatoes and then stabbed her husband with it⁶⁶⁴.

Another objection to the decision in Burgess is that the fundamental requirement that the defect of reason be caused by disease of the mind was not satisfied. The defendant's consciousness and therefore his faculty of reason was suspended when he fell asleep and hence his defect of reason was caused by sleep, a natural condition, and not by sleep-walking which was classified as a pathological or internal condition⁶⁶⁵. This is the approach which was taken by the Ontario Court of Appeal in R v Parks⁶⁶⁶, approving the trial judge's ruling that "it would not seem consonant with sound criminal law policy to force into the notion "disease of the mind", and hence legal insanity, and the stigmatization and confinement associated with a special verdict, a person who suffers from a sleep disorder whose behaviour whilst in an awakened state is otherwise socially acceptable"⁶⁶⁷.

Notwithstanding the English Court of Appeal's decision in Burgess, which was decided in the interim between the decision of the Ontario Court of Appeal and that of the Supreme Court, the Supreme Court of Canada upheld Parks' acquittal on

⁶⁶⁰ Described by N.Walker op cit p.170

⁶⁶¹ ibid p.170

⁶⁶² ibid pp.170 & 171

⁶⁶³ *The Times* and *The Guardian* 18 Feb.1961

⁶⁶⁴ (1978) *The Times* 3 May 1978

⁶⁶⁵ I.McKay "The Sleepwalker is Not Insane" (1992) 55 M.L.R.714 p.719

⁶⁶⁶ (1990) 56 C.C.C.3d.449

⁶⁶⁷ ibid p.452

the grounds of automatism⁶⁶⁸, the majority following the Court of Appeal's line of reasoning. The minority (consisting of LaForest and five concurring judges) was of the opinion that somnambulism is a condition that is not well-suited to analysis under either of the "continuing danger" or "internal cause" theories and that the court may also have to look to certain additional policy considerations such as whether the condition is easily feigned and whether the recognition of the condition as non-insane automatism would open the floodgates. The minority found that none of these factors suggested that somnambulism should be considered a disease of the mind and that accordingly, there were no compelling policy factors to preclude a finding that the accused's condition in this case was one of non-insane automatism.

It appears that the Court of Appeal may have *sub silentio* adopted this internal/external cause distinction in the earlier case of R v Sullivan⁶⁶⁹. There the appellant, a man of blameless reputation, was charged with inflicting grievous bodily harm in the final stage of recovering from a minor epileptic seizure. He pleaded guilty to the lesser charge of assault occasioning actual bodily harm, after the trial judge ruled that his condition amounted to insanity and not automatism. The Court of Appeal conceded that an external factor such as a blow to the head causing concussion or the administration of an anaesthetic for therapeutic purposes might warrant a finding of automatism. However if, as in this case, there was impairment of the defendant's faculties of reason, memory and understanding, it did not matter whether this impairment was organic, as in epilepsy, or functional or permanent or transient and intermittent provided that it subsisted at the time of the commission of the act.

As with sleep-walking, epilepsy was presumed for many years to be a paradigmatic example of automatism. Barry J. in Charlson was of the view that a criminal act committed by an epileptic would warrant an acquittal "because the actions of an epileptic are automatic and unconscious and his will or consciousness is not applied to what he is doing"⁶⁷⁰, while Lord Denning in Bratty described

⁶⁶⁸ 75 C.C.C.3d.287

⁶⁶⁹ [1983] 2 All E.R.673

⁶⁷⁰ [1955] 1 All E.R.859 p.861

automatism as "an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion"⁶⁷¹.

In the course of this endeavour to protect the public, the courts have clearly eschewed all logic in the classification of conditions as insane⁶⁷². On a commonsense understanding of the term insanity (and the Court of Appeal in Quick did, after all, stress that the issue of insanity should be approached "in a commonsense way"⁶⁷³) neither the epileptic nor the sleep-walker can be classified as insane.

The Canadian Court of Appeal in Parks⁶⁷⁴ warned that "an appellate court must guard against..any temptation to eliminate or limit a defence recognized by law because of the unsympathetic factual context in which the defence is presented for review"⁶⁷⁵. Unfortunately this is not the approach which the English Court of Appeal has taken and as a result, the defence of automatism has been whittled away almost to the point of non-existence.

The test in Quick is capable of leading to very arbitrary results. Although sleep-walking will be treated as a disease of the mind, if caused by eating cheese it will qualify for the defence of automatism as cheese⁶⁷⁶ would probably be considered to be an external cause⁶⁷⁷. Under the internal/external factor doctrine it matters whether the accused's automatism was the result of a failure to take insulin or a failure to take the proper amount⁶⁷⁸. Whilst the latter diabetic will receive an outright acquittal, the former has, until recently, received automatic indefinite incarceration and the stigma of an insanity label. Avoidance of this fate was obviously the primary consideration of Sullivan and Quick, both of whom pleaded guilty after hearing that his condition amounted to insanity.

⁶⁷¹ [1963] A.C.386 p.409

⁶⁷² A.Norrie op cit p.179

⁶⁷³ [1973] Q.B.910 p.922

⁶⁷⁴ (1990) 56 C.C.C.3d 449

⁶⁷⁵ ibid p.469

⁶⁷⁶ There is some anecdotal evidence that sleep-walking may be caused by eating cheese before sleep.

⁶⁷⁷ Graham Virgo "Sanitising Insanity - Sleep-walking and Statutory Reform" [1991] C.L.J.286 p.287

⁶⁷⁸ A.Norrie op cit p.179

In the case of murder, diminished responsibility with its wide powers of disposal has, since 1957, acted as a safeguard in these cases. Morris and Blom-Cooper⁶⁷⁹ cite the cases of Brian George Candy⁶⁸⁰, William Reynolds⁶⁸¹, William Henry Abernathy⁶⁸², Rodney William Bailey⁶⁸³ and Stanley Lister⁶⁸⁴ as instances where epileptics succeeded in raising the defence of diminished responsibility. The sentence imposed in these cases varied from life imprisonment to a hospital order. They also describe the case of Richard William Bryant (age 79), a Naval pensioner, who strangled his wife with a dressing gown cord at home. They were devoted to each other. On 23/3/1961 at Hampshire Assizes, Bryant was found not guilty of murder but guilty of manslaughter under section 2, after doctors testified that he suffered from arteriosclerosis. Mr Justice Elwes made a hospital order with restrictions for twelve months under sections 60 and 65 of the Mental Health Act, 1959⁶⁸⁵. It is interesting to compare the outcome of this case with that of Kemp whose arteriosclerosis led to a finding of insanity (rather than automatism). The indefinite committal which followed is the equivalent of a hospital order with restrictions without limit of time⁶⁸⁶.

Fortunately the situation has been ameliorated in England by the Criminal Procedure (Insanity and Unfitness to Plead) Act, 1991 which provides for discretionary disposal of the criminally insane except in the case of offences carrying a fixed penalty. The inapplicability of the 1991 Act to insane murderers however, signifies a continuing need for the discretionary disposal consequences which accompany the diminished responsibility defence, to protect the epileptic, the diabetic and the sleep-walker⁶⁸⁷ who kill, from the "double-edged acquittal"⁶⁸⁸ which follows a finding of insanity in the case of murder.

⁶⁷⁹ A Calender of Murder: Criminal Homicide in England since 1957 (London, 1964)

⁶⁸⁰ ibid p.41

⁶⁸¹ ibid p.83

⁶⁸² ibid p.171

⁶⁸³ ibid p.173

⁶⁸⁴ ibid p.247

⁶⁸⁵ ibid p.178

⁶⁸⁶ S.Dell "Wanted: an Insanity Defence That can be Used" [1983] Crim.L.R.431 p.432

⁶⁸⁷ The *obiter dictum* of Lord Lane in *R v Smith* [1979] 1 W.L.R.1445 suggests that sleep-walking will qualify for the defence of diminished responsibility

⁶⁸⁸ Described in these terms by Celia Wells "Whither Insanity?" [1983] Crim.L.R.787 p.788

2.5.2 Psychological Blow

Whether a dissociative state resulting from a psychological blow can give rise to a defence of automatism, has yet to be decided by the English Courts, although a number of Canadian cases have accepted that a psychological blow may be viewed as an external cause leading to an acquittal on the grounds of automatism⁶⁸⁹. However, the Ontario Court of Appeal in Rabey⁶⁹⁰ has since held that a dissociative state arising from a psychological blow is not an external cause for the purposes of automatism. Holding that "the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a 'disease of the mind'", the Court of Appeal left open the question whether a dissociative state resulting from an emotional shock that might be presumed to affect the average normal person can amount to an external cause.

The facts of Rabey are of interest as an illustration of the circumstances that can give rise to a dissociative state. The defendant, a university student who was emotionally attached to the victim, discovered in a letter she had written that she regarded him as a "nothing". The next day the defendant met the victim by chance and hit her with a rock which he had taken from the geology lab to study. He then began to choke her. A witness who saw the defendant shortly afterwards, described him as very pale, sweating, glassy-eyed and as having a frightened expression. The defendant testified that he could not remember striking the victim. A psychiatrist called by the defence testified that the accused had entered into a complete dissociative state after conversing with the victim, in which he was capable of performing physical actions but without consciousness of such action. The dissociative state, which was comparable to that produced by a physical blow, was caused by a psychological blow. The psychiatrist testified that this was not a disease of the mind, that he could find no evidence that the accused had suffered from any pathological condition and that there was only a slight possibility of recurrence. The trial judge accepted the evidence of the

⁶⁸⁹ See R.D.Mackay "Non-Organic Automatism - Some Recent Developments" [1980] Crim.L.R.350 pp.353-355 for a summary of these decisions.

⁶⁹⁰ 54 C.C.C.3d.1

defence psychiatrist and the defendant was acquitted. The Crown then successfully appealed to the Ontario Court of Appeal. The Canadian Supreme Court affirmed the finding of the Court of Appeal.

The minority view that in the absence of psychiatric disorder, the possibility of recurrence or the need for treatment, Rabey's dissociative state should not have been branded with the label of insanity, has received support from academic commentators⁶⁹¹. However, in view of the increasingly visible public protection role of the insanity defence and the recent unsatisfactory developments with regard to sleep-walking and epilepsy, it is likely that Rabey will be followed by the English Courts. In the recent Crown Court decision of R v T.⁶⁹², the defendant was acquitted on the grounds of automatism of charges of robbery and actual bodily harm, after medical evidence was led that being a victim of a rape three days prior to the offences had led to post traumatic stress disorder in the defendant. The psychiatrist testified that at the time of the offence she had entered a dissociative state and that the offences had been committed during a psychogenic fugue so that she was not acting with a conscious mind or will.

In deciding that the rape was an external cause for the purposes of automatism the judge found that "such an incident could have an appalling effect on any young woman, however well-balanced normally"⁶⁹³. The decision falls squarely within the exceptional circumstances which would affect the average person, envisaged in Rabey, but the availability or not of the defence of automatism where the dissociative state is induced by the "ordinary stresses and disappointments of life" has yet to be decided by the English Court of Appeal.

Although not described as "dissociation" similar states have, in the past, led to successful diminished responsibility defences. Morris and Blom-Cooper recount the cases of Rosalia Garofalo⁶⁹⁴, Albert Houghton⁶⁹⁵, Alec Taylor Lawrence⁶⁹⁶,

⁶⁹¹ Glanville Williams op cit p.675; R.D.Mackay op cit p.359

⁶⁹² [1990] Crim.L.R.256

⁶⁹³ ibid p.258

⁶⁹⁴ Morris and Blom-Cooper op cit p.51

Edmund William Barber⁶⁹⁷ and Reginald James Bruce⁶⁹⁸ where emotional stress led to a successful diminished responsibility plea.

More recently in Eeles the terminology of dissociation was deployed⁶⁹⁹ when a 36-year-old man was tried for shooting dead a family of three who had made his life a living hell. The family, two of them with a history of mental trouble, were said to have tormented neighbours for years with insults, arguments, late-night record playing and banging on doors. Eeles was jailed for three years after a jury found him not guilty of murder but guilty of manslaughter by reason of diminished responsibility⁷⁰⁰.

The defence of diminished responsibility has, in these cases, bridged the gap between a verdict of murder (resulting in either the death penalty or today, the mandatory life sentence) and an insanity verdict (whose consequence until 1991 was mandatory indefinite confinement). With the restriction of the defence of automatism due to the expansion of "disease of the mind", the diminished responsibility defence has availed those murderers who wished to avoid the stigma of an insanity verdict and its inflexible disposal consequences. As the above cases illustrate, the wide disposal consequences associated with diminished responsibility have permitted a more just and humane outcome in cases where indeterminate hospitalisation might not be perceived to be necessary or deserved. For this reason it may be concluded that diminished responsibility has remedied several defects in the McNaghten Rules: Not only abnormalities that fail to reach the standard of McNaghten madness have come within the defence of diminished responsibility, but the defence has attracted defendants who *do* fall within the Rules, as a result of its ability to respond more accurately to their individual needs.

By giving expression to the medical viewpoint of epilepsy, hyperglycaemia and dissociation (these are not regarded as amounting to medical insanity nor as

⁶⁹⁵ ibid p.54

⁶⁹⁶ ibid p.60

⁶⁹⁷ ibid p.80

⁶⁹⁸ ibid p.128

⁶⁹⁹ Glanville Williams op cit p.674

⁷⁰⁰ See *The Times* 22 Nov 1978

needing indefinite hospitalisation) it is tempting to infer the evolution of a happy partnership between law and medicine, exemplified in the above cases. This has also arisen because the defence is propitious to psychiatric testimony on almost any abnormality of mind that might substantially impair responsibility. The defence's potential as a forum for psychiatric testimony will now be addressed.

2.6 DIMINISHED RESPONSIBILITY AND PREMENSTRUAL TENSION

Unlike the United States practice of allowing premenstrual tension (P.M.T.) as a complete defence to criminal charges, in English law P.M.T. is only relevant to mitigation of sentence. In murder cases, where there is no discretion as to sentence, P.M.T. has been held to amount to an abnormality of mind for the purpose of the diminished responsibility defence. Treating the condition as a mental abnormality which may lead to a diminished responsibility verdict if responsibility is substantially impaired, has bridged the wide gulf between a conviction of murder and the defence of insanity. It has also paved the way for the reception of medical evidence on abnormalities of mind produced by bodily malfunctions and provided a just disposition for the defendant whose abnormality has produced an alien character or proclivities.

The premenstrual syndrome (P.M.S.), "a hormone deficiency disease"⁷⁰¹, has a variety of symptoms including headache, breast swelling and tenderness, abdominal bloating, weight gain, acne, asthma, constipation, cravings for sweet or salty foods, tension, irritability, aggressiveness, lethargy, anxiety and depression⁷⁰², which occur in the same phase in each menstrual cycle, followed by a symptom-free phase⁷⁰³. These symptoms appear several days before the onset of menstruation and reach peak intensity during the last four days of the premenstruation period or the first four days

⁷⁰¹ Taylor and Dalton "Premenstrual Syndrome: A New Criminal Defense?" (1983) 19 Calif.W.L.Rev.269

⁷⁰² R.A.Diliberto "Premenstrual Stress Syndrome Defence: Legal, Medical and Social Aspects" 33 Med.Trial Tech.Q.351 at p.352

⁷⁰³ Taylor and Dalton op cit pp.271 & 272

of actual menstruation, the paramenstruum⁷⁰⁴. Despite scepticism from the medical profession on the grounds that its advocate Dr.Katharina Dalton has never subjected her work to controlled studies⁷⁰⁵, the evidence advanced in favour of the condition is convincing.

As well as increased propensity to recidivism during the paramenstruum⁷⁰⁶, Dalton has discovered that psychiatric disabilities have been exacerbated by P.M.S.. An analysis of hospital admissions for acute psychiatric illness showed that 46% of female patients were admitted during their paramenstruum. Women suffering from P.M.T. constituted 53% of the attempted suicides, 47% of those admitted for acute depression and 45% of those admitted for schizophrenia⁷⁰⁷.

P.M.S. has now been accepted as being an abnormality of mind within section 2 of the Homicide Act, in three English cases. In R v Craddock⁷⁰⁸, a woman of thirty years stabbed to death a barmaid after a fight broke out in the pub where she worked. She was convicted of manslaughter due to diminished responsibility brought on by P.M.S., after medical evidence was tendered that her uncontrolled disruptive behaviour which had resulted in thirty previous convictions, could be treated by daily injections of progesterone. The case was set back to allow a period of treatment, during which the defendant's behaviour improved considerably. Mr James Miskin, Recorder of London, made a probation order of three years (the maximum possible), with a condition that Craddock should receive such treatment as prescribed.

In R v English⁷⁰⁹ a thirty seven year old woman was convicted of diminished responsibility manslaughter owing to P.M.S., after she killed her lover by crushing him against a lamp post with her car. English had no previous convictions and no history of uncontrolled violence. Psychiatric evidence was offered to the effect that P.M.S. follows from post natal depression in about ninety percent of cases. English

⁷⁰⁴ ibid p.272

⁷⁰⁵ Di Liberto op cit p.357

⁷⁰⁶ Taylor and Dalton op cit pp.274 & 275

⁷⁰⁷ ibid p.275

⁷⁰⁸ Reported in the Lancet [1981] 25 Nov.1238

⁷⁰⁹ ibid

had suffered from this condition in 1966. The expert witnesses testified that the defendant's sterilisation in 1971 had increased the severity of P.M.S.. P.M.S. combined with a long period of food abstinence was apparently responsible for her violent, irritable and impulsive behaviour. Dr.Katharina Dalton, who had also found Craddock to be suffering from P.M.S., gave evidence that P.M.S. is a disease of the body and therefore a disease of the mind because the upset bodily metabolism upsets the mental processes. She was supported in this by Dr.Hamilton, a consultant psychiatrist at Broadmoor. English was banned from driving for one year and given a conditional discharge for a year. Her "treatment" was to see that she ate regularly and avoided alcohol.

In 1988 the Court of Appeal substituted a verdict of manslaughter on the grounds of diminished responsibility, after Dr.Dalton tendered evidence that the defendant had been suffering from a conjunction of premenstrual tension and post-natal depression when she had killed her mother⁷¹⁰.

A recent commentator has advocated treating P.M.S. as a condition justifying an acquittal on the grounds of automatism⁷¹¹. Because P.M.S. arises from a condition *internal* to the sufferer this approach is unlikely to commend itself to the courts. Nevertheless, he has proposed that there should be an acquittal on the grounds of automatism where the effect of the state of disequilibrium is to create an alien character or proclivities and he lists involuntary intoxication, post traumatic stress disorder, battered woman's syndrome, severe pre-menstrual tension, hyperglycaemia, hypoglycaemia and epilepsy, as conditions which should exclude liability on these grounds⁷¹². However, the law's position is that automatism is limited to unconscious involuntary action and the recent decision of the House of Lords in Kingston⁷¹³ brings home the necessity of disproving *mens rea* where an involuntary act is pleaded. The diminished responsibility defence can be used, as it has been in the case of P.M.T., as

⁷¹⁰ *R v Reynolds* [1988] Crim.L.R.679

⁷¹¹ G.R.Sullivan "Involuntary Intoxication and Beyond" [1994] Crim.L.R.272 p.274

⁷¹² *ibid*

⁷¹³ [1994] 3 All E.R.353. See further F.Boland "Involuntary Intoxication is Not a Defence" [1995] 4 Web J.C.L.Issues

a medium for dealing with those cases where *mens rea* is present, sparing the defendant from a verdict of murder and the mandatory life sentence.

The implications of treating P.M.S. as a species of automatism should be obvious: If one is to classify *any* bodily disease where the metabolism upsets the mental processes as meriting an acquittal on the ground of automatism then the floodgates are likely to be opened. There are probably many cases where high testosterone levels in men account for outbursts of violence. The implications of P.M.T. as a defence are evident from Dalton's discovery that 49% of 156 newly committed London prisoners had committed their crime in the paramenstruum (i.e. four days before and the first four days of menstruation)⁷¹⁴. As is evident from the preceding discussion of the defence of automatism, the courts have been anxious to impose constraints on the numbers who can plead it.

The feminist objection to recognition of P.M.T. as a legal excuse is that, while on the surface, appearing to give recognition to the real and painful experience of an individual woman, P.M.T. as a legal defence simply replicates traditional male stereotypes of women as "victims of their biology"⁷¹⁵ and that the law is more predisposed to explore psychiatric explanations for women's behaviour⁷¹⁶. Nonetheless, I am sure that most women would prefer to suffer the indignity of raising P.M.T. in the hope of obtaining a manslaughter conviction under section 2, rather than risk the mandatory life sentence which follows a conviction of murder.

Taylor and Dalton concede that science may never be able to say that a criminal act was actually *determined* by an individual's hormonal condition rather than merely influenced by it and that it is presently impossible to determine precisely, to what degree conduct may be influenced by the premenstrual syndrome⁷¹⁷. This is not a stumbling block to recognition of P.M.T. within the defence of diminished

⁷¹⁴ Dalton and Taylor op cit p.274

⁷¹⁵ David Fraser "Still Crazy After All These Years: A Critique of Diminished Responsibility" in Stanley Yeo *Partial Excuses to Murder* (Sydney, 1991) p.122

⁷¹⁶ Helena Kennedy *Eve was Framed* (London, 1992) p.104

⁷¹⁷ Taylor and Dalton op cit pp.282 & 283

responsibility, as diminished responsibility *per se* is a *state of mind* that reduces liability to punishment. Admittedly, large numbers might have to be excused full liability to punishment (Dalton estimates that the incidence of P.M.T. may be as high as 40%⁷¹⁸) but surely a diminished responsibility defence is more appropriate than an acquittal on the grounds of automatism. Through a diminished responsibility verdict treatment can be provided *via* a hospital order and if it is felt that there is some measure of blameworthiness involved a prison sentence can be imposed to reflect that level of culpability.

Allowing medical testimony on P.M.T. has paved the way for the reception of medical evidence on bodily malfunctions which affect normal mental processes. Despite a century's reluctance to listen to medical discoveries on insanity they are now deferred to in the context of the diminished responsibility plea.

2.7 DIMINISHED RESPONSIBILITY AND PROVOCATION

The diminished responsibility defence has also stepped in to remedy the limitations of the defence of provocation. It is not uncommon for the defence of diminished responsibility to be combined with that of provocation. As the Criminal Law Revision Committee has noted

"It is now possible for a defendant to set up a combined defence of provocation and diminished responsibility, the practical effect being that the jury may return a verdict of manslaughter if they take the view that the defendant suffered from abnormality of mind *and* was provoked. In practice this may mean that a conviction of murder will be ruled out although the provocation was not such as would have moved a person of normal mentality to kill"⁷¹⁹.

⁷¹⁸ ibid p.273

⁷¹⁹ Working Paper on Offences Against the Person, (London, 1976)

In theory, provocation and diminished responsibility are two separate and distinct methods of reducing murder to manslaughter. Provocation requires a loss of self-control in an ordinary person with a normal mind⁷²⁰, while diminished responsibility requires the accused to have been suffering from an abnormality of mind. However, as Mackay has concluded⁷²¹, neither juries nor trial judges seem to have been unduly perturbed by the illogicality of the combined defence. His opinion is that once expert evidence of mental abnormality, which manifests itself in inadequate powers of control, emotional instability etc. is introduced, the jury cannot help but be influenced by it in their assessment of both diminished responsibility *and* provocation⁷²². In this way a defendant can receive the benefit of psychiatric evidence that is denied to him when pleading provocation alone, in accordance with judgment of the Court of Appeal in Turner⁷²³. There the court excluded psychiatric testimony on the defendant's likelihood to have been provoked on the basis that jurors do not need expert witnesses to tell them how ordinary people who are not suffering from any mental illness are likely to react to the stresses and strains of life. If the defendant combines his plea of provocation with that of diminished responsibility, expert evidence on the defendant's abnormality will throw light on the defendant's likelihood to have been provoked. Furthermore, there seem to be indications that when the two pleas are run concurrently the jury may be prepared to adopt a liberal attitude towards each; perhaps reasoning that the alleged abnormality of mind renders a loss of self-control more likely and by the same token, that an abnormality of mind partly explicable through psychiatric testimony relating to frequent and severe provocative incidents is equally acceptable to them⁷²⁴. This may ameliorate the position of battered women, who often kill a violent or abusive partner after the provocative episode has passed⁷²⁵. The rule in Duffy⁷²⁶ that the killing must result from a sudden and temporary loss of self-control has frequently denied the defence of provocation to battered

⁷²⁰ The law presupposes normal powers of self-control

⁷²¹ R.D.Mackay "Pleading Provocation and Diminished Responsibility Together" [1988] Crim.L.R 411 p.417

⁷²² The same view has been expressed by J.L.I.J.Edwards in his article "Diminished Responsibility - A Withering Away of the Concept of Responsibility" in Mueller op cit p.327

⁷²³ *R v Turner* [1975] 1 Q.B.834

⁷²⁴ R.D.McKay "Pleading Provocation and Diminished Responsibility Together" op cit p.421

⁷²⁵ J.Horder *Provocation and Responsibility* (Oxford, 1992) p.188

⁷²⁶ [1949] 1 All E.R.932

women who have killed⁷²⁷. Despite the ruling of the Court of Appeal in Ahluwalia⁷²⁸ that sudden loss of self-control is no longer a fixed requirement of the provocation defence but merely evidence of lack of premeditation, it seems that there is still a presumption that the longer the delayed reaction to the provocation the more likely it is that it was a revenge killing, rather than a killing under provocation. The combined defence may, based on Mckay's analysis, make the defence of provocation more credible where a woman suffering from a mental abnormality has killed her violent partner after a period of time has elapsed.

Another advantage of the combined plea to the defendant who was provoked is that it may well result in a more lenient outcome than a defence of provocation alone⁷²⁹ as the view of the Court of Appeal is that, in provocation cases, a term of imprisonment is almost always necessary to expiate the offence⁷³⁰. Thus, combining a provocation defence with the defence of diminished responsibility gives increased flexibility to the courts in disposing of individuals who, for one reason or another, do not appear to deserve the full rigour of the mandatory life sentence. It allows for increased humanity in cases evoking sympathy and pity⁷³¹ and enables the law to reflect the moral judgment of the community.

⁷²⁷ *R v Davies* [1975] 1 All E.R.890; *R v Whitfield* (1976) 63 Cr.App.R.39; *R v Ibrams and Gregory* (1982) 74 Cr.App.R.154; *R v Thornton* [1992] 1 All E.R.306

⁷²⁸ (1993) 36 Cr.App.R.133

⁷²⁹ Glanville Williams *Textbook of the Criminal Law* (2nd ed) 1983 pp.544 & 545

⁷³⁰ C. Wells "Battered Woman Syndrome and Defences to Homicide" (1994) 14 L.S.266

⁷³¹ See R.D.Mackay "Pleading Provocation and Diminished Responsibility Together" op cit for an illustration of the factual context of several combined provocation and diminished responsibility defences.

2.8 DIMINISHED RESPONSIBILITY AND INTOXICATION

When states of intoxication and diminished responsibility occur concomitantly, the rules on diminished responsibility are swept aside and the policy considerations that underlie the law on intoxication take precedence. These considerations, as stated in the Law Commission's Consultation Paper on Intoxication⁷³², are that it would be "too dangerous, or too unjust, in terms of unmerited acquittals or failure to control drunkards who threaten their fellow citizens, to allow evidence of intoxication to be taken into account in determining mens rea".

In this section I will reveal the uncertain and varying application of the diminished responsibility defence where intoxication is a factor, until the recent decision of the Court of Appeal in Egan⁷³³. Although the diminished responsibility plea was frequently allowed in cases of drunkenness in nineteenth century Scotland, often in the absence of any evident mental abnormality other than the state of intoxication itself, this approach was abandoned in 1921 in favour of the rule in Beard's⁷³⁴ case. This rule, which has been approved more recently in Majewski⁷³⁵, allows intoxication to negate *mens rea* only in crimes requiring a specific intent.

The introduction of diminished responsibility into English law brought with it a new challenge: how to deal with the offender who pleaded both diminished responsibility and intoxication at the time of the offence. Was the Scottish approach to be followed or could a more lenient formula be worked out? The decision to abandon the principles of law on diminished responsibility in favour of the policy considerations mentioned above is the focus of this section and is relevant to any determination of whether the defence of diminished responsibility works well when intoxication has contributed largely or in part.

⁷³² *Intoxication and Criminal Liability* Consultation Paper No.127 (London, 1993) para.1.13

⁷³³ (1992) 95 Cr.App.R.278

⁷³⁴ (1920) 14 Cr.App.R.159

⁷³⁵ [1976] 2 All E.R.142

In Scotland following H.M. Advocate v Dingwall⁷³⁶, an abnormal mental state falling short of legal insanity which was induced by intoxication was capable of giving rise to a verdict of diminished responsibility. There Lord Deas treated the defendant's repeated attacks of *delirium tremens* as one of the relevant considerations in allowing the jury to return a verdict of culpable homicide instead of murder.

Lord Deas took the same course of action in H.M. Advocate v Granger⁷³⁷ where the defendant was charged with the murder of a police constable while suffering from *delirium tremens*, directing the jury that

"although the jury might not consider the panel in the present case to have been insane, it did not follow that they must convict him of the capital offence. He would say to them, as he said to the jury in Dingwall's case at Aberdeen, that a weak or diseased state of mind, not amounting to insanity, might competently form an element to be considered in the question between murder and culpable homicide"⁷³⁸.

A succession of nineteenth century Scottish cases showed that henceforth, intoxication by itself could reduce a verdict of murder to one of culpable homicide: In H.M. Advocate v Margaret Roberts or Brown⁷³⁹ an old woman was charged with the murder of two infant grandchildren by placing them on a fire of live coals after having taken a considerable quantity of alcohol. The medical evidence negated the defence of insanity. It was established that she was of intemperate habits and became violent when intoxicated, although she was fond of her grandchildren. She told the doctor who saw her after the occurrence that she thought something had entered the house, and that she had struggled with it. Lord McLaren directed the jury that if they were of opinion that the accused was watching the children with no evil intention, and that under the influence of some momentary hallucination induced by drunkenness she had placed the children on the fire, they were entitled to return a verdict of

⁷³⁶ (1867) 5 Irv.466

⁷³⁷ (1878) 4 Couper 86

⁷³⁸ ibid p.103

⁷³⁹ (1886) 1 White 103

culpable homicide. This they did (unanimously) and a sentence of ten years' penal servitude was pronounced upon the accused.

However in the case of Thomas Ferguson⁷⁴⁰, there was evidence of weakness of mind caused by previous intemperance. The accused was, in fact, sober at the time he had stabbed his wife. Although Lord Deas referred to Dingwall and to the principle adumbrated therein, he pointed out that this was a much more difficult case to which to apply that principle and law. Dingwall was habitually a much kinder husband than the prisoner, and there was neither the deliberate preparation for the act, nor the ferocity in its execution which the prisoner's act manifested here⁷⁴¹. The jury duly found the accused guilty of murder, although with a recommendation to mercy on account of being a man of weak mind.

John McDonald⁷⁴² had killed his wife and another man by beating them with a piece of wood and a piece of iron. The defence pleaded temporary insanity brought on by alcoholism and further submitted that at the highest, the jury could only place the crime within the category of culpable homicide. The Lord Justice Clerk held that

"while drunkenness is no excuse, yet if the means adopted were not of themselves likely to lead to bad results, and if there was no malice aforethought here, then the fact that the man was in a drunken state may be considered in determining the question between murder and culpable homicide. I should have had great difficulty in saying that, but for the fact that I see from the full and clear citation of authorities which we have had, that some of my brethren have taken that view in some similar cases. I have some doubts whether or not it is consistent with principle, but if you will keep clearly in view that drunkenness is no excuse for what occurred here, then I am not inclined to set my own opinion against that of the experienced Judges to whom I have referred, and to debar you from considering whether a crime committed in this

⁷⁴⁰ *H.M. Advocate v Thomas Ferguson* (1887) 4 Couper 552

⁷⁴¹ ibid p.558

⁷⁴² *H.M. Advocate v John McDonald* (1890) 2 White 517

drunken state, without motive and without preconceived malice, although murder, in the strict sense of the law, may not be viewed by you as falling within the category of a case of aimless violence not absolutely murderous"⁷⁴³.

Again in H.M. Advocate v David Kane⁷⁴⁴, the jury were told by the same Lord Justice Clerk that they could take the accused's intoxicated condition into account in considering whether the killing of his wife was murder or culpable homicide.

H.M. Advocate v John Graham⁷⁴⁵ involved the trial of a defendant who had shot his wife after a bout of drinking. Evidence was led of his devotion to her, that he was a man of soft temperament and that he was subject at times to fits which left him unconscious as a result of having been struck by lightning when a young man. The Lord Justice Clerk left the issue of culpable homicide to the jury, illustrating the comparisons with Dingwall's case.

In England the old and rigid rule that voluntary drunkenness cannot be taken into account if it does not produce a state of insanity (albeit temporary⁷⁴⁶), was gradually relaxed in a series of cases spanning the nineteenth century, culminating with D.P.P. v Beard. Here the House of Lords ruled that drunkenness is a defence to crimes of specific intent only (as distinct from crimes of basic intent), provided it prevents the accused from having that intent. Beard has since been followed in R v Majewski. However, in the case of murder an alternative charge of manslaughter (a crime of basic intent) will lie, to which intoxication is no defence.

The similarities between the Beard approach and the Scottish approach are so striking that it is arguable that Beard was yet another case where diminished responsibility was partially accepted in English law. One may look at the English

⁷⁴³ ibid pp.523 & 524

⁷⁴⁴ (1892) 2 White 386

⁷⁴⁵ (1906) 5 Adam 212

⁷⁴⁶ *R v Davis* (1881) 14 C.C.C.563

approach to intoxication as creating a defence in cases of murder (a crime of specific intent) which will result in a verdict of manslaughter (a basic intent crime) where the accused was so intoxicated as to be incapable of forming the specific intent required for murder. **Beard** was yet another example of judicial legislation intended to mitigate the severity of the law on murder. However I have failed to treat this as a precursor to the English defence of diminished responsibility as the "defence" component was not limited to murder but to all crimes of specific intent. Furthermore, **Beard** involves substantially more than simply whether the defendant had the specific intent required for his crime. The major part of the law propounded in **Beard** is taken up with constructing rules to ensure that the jury do not take intoxication into account in determining whether the defendant had the *mens rea* required for crimes of basic intent⁷⁴⁷.

In the early years of the twentieth century the Scottish defence of diminished responsibility was restricted considerably, especially where intoxication formed part of the defence and the English approach to intoxication, as stated in **Beard**, seems to have found more favour with the Scottish judges.

In H.M. Advocate v Nicholas Page Campbell⁷⁴⁸ the accused was charged with the murder of his wife by beating her to death while in a state of intoxication. The medical evidence was to the effect that he was not insane but that he had at one time been injured in the head, and as a result he was abnormally susceptible to alcohol and abnormally violent when under its influence. The defence contended that the intoxicated condition of the accused at the time of the assault reduced the crime from murder to culpable homicide. The Lord Justice Clerk, Scott Dickson, approving D.P.P. v Beard as part of Scottish law, ruled that the accused was guilty of murder unless at the time of the assault he was, owing to drunkenness, in such a condition that he had not the intention and could not form the intention of doing serious injury to his wife. The jury found the accused guilty of culpable homicide rather than murder and he was sentenced to penal servitude for twelve years.

⁷⁴⁷ *Intoxication and Criminal Liability* Law Commission Consultation Paper No.127 op cit para.1.13

⁷⁴⁸ [1921] J.C.1

The Scottish defence of diminished responsibility was restricted further in **H.M. Advocate v Savage**⁷⁴⁹. The defendant was tried for the murder of a woman by cutting her throat with a razor. Evidence was led on behalf of the accused that at one time he had received an injury to his head and instances were given of his eccentric conduct on several occasions. Evidence was also led to the effect that he was in the habit of indulging to excess in alcohol and was constantly under its influence and that at times he also drank methylated spirits and that when under their influence he was violent and irresponsible. Witnesses also spoke of his being under the influence of methylated spirits or alcohol on the night of the murder.

The Lord Justice-Clerk, Alness, first stated that the Scottish doctrine of diminished responsibility must be applied with care and he then proceeded to delimit its precise scope

"..there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility..And I think one can see running through the cases that there is implied..that there must be some form of mental disease."⁷⁵⁰.

Not surprisingly the jury unanimously found the accused guilty of capital murder.

Beard and **Campbell** were approved some years later by Lord Justice General Normand who ruled that the crime of murder is not reduced to the crime of culpable homicide by the drunkenness of the accused, unless the drunkenness

⁷⁴⁹ [1923] J.C.49

⁷⁵⁰ ibid p.51

is such as to render the accused incapable of forming the intent to kill or to do serious injury at the time when the crime is committed⁷⁵¹.

Carraher v H.M. Advocate⁷⁵² concerned a psychopathic man tried for murder by stabbing when drunk. The medical evidence stated that his psychopathy would be aggravated when intoxicated. In this case it seems that drunkenness was considered in isolation from the defendant's psychopathic personality, rather than in association with it, and the defendant was convicted of murder. On appeal, Lord Normand gave the same direction as he had given in Kennedy. As neither psychopathic personality nor intoxication short of negating intention was sufficient to reduce a charge of murder to manslaughter, the defendant's appeal was dismissed.

When diminished responsibility was introduced in England, therefore, it seemed that intoxication would not afford a defence if Scottish law was followed. The case of Di Duca⁷⁵³ gave the Court of Appeal its first opportunity to settle the issue. The defendant who was convicted of capital murder relied among other defences, on that of diminished responsibility, the suggestion being that he was suffering from abnormality of mind induced by "injury" within the meaning of 2(1) of the Homicide Act 1957, namely the toxic effect of drink and that such abnormality so induced substantially impaired his responsibility. After retirement, the jury returned and asked the judge the following question: "if a man's mind is impaired by the effects of alcohol, does the verdict come under that of manslaughter or murder?" The judge thereupon gave them the well-recognised direction with regard to the effect of drink on intent, without any reference to the effect of drink on diminished responsibility. On appeal the Court of Appeal held that it is "very doubtful" if the transient effect of drink, even if it does produce such a toxic effect on the brain, can amount to an "injury" within section 2 and evaded coming to a definite decision by ruling that in this case there was no evidence of abnormality of mind.

⁷⁵¹ *Kennedy v H.M. Advocate* [1944] J.C.171

⁷⁵² [1946] J.C.108

⁷⁵³ (1959) Cr.App.R.167

Not long after in R v Dowdall⁷⁵⁴, Donovan J. stated that if a normal person got drunk or drank to excess it would be no defence to say he lost his self-control or his self-control was diminished. The section in the Homicide Act dealing with diminished responsibility was not intended to be, nor was it, a charter for drunkards. He also directed the jury that if they accepted that the defendant was suffering from an abnormality of mind so that it substantially impaired his responsibility for the killing then they should find him guilty of manslaughter instead of murder. Two doctors had expressed the view that even if the defendant did not drink at all he would still suffer from an abnormality of mind, and the jury duly found him guilty of manslaughter under section 2.

Again in R v Clarke and King⁷⁵⁵, the Court of Appeal, although *obiter*, asserted that their substitution of a manslaughter verdict

"must not be taken to be ruling that any abnormality of mind however slight and producing however little impairment will constitute a defence when that slight impairment is increased substantially by drink: that was a matter which remained to be considered on another occasion"⁷⁵⁶.

The first authoritative pronouncement on the law where diminished responsibility and intoxication combine did not arrive until the decision of Fenton⁷⁵⁷ where five medical witnesses agreed that the defendant was suffering from an abnormality of mind by virtue of his psychopathic personality, which had been aggravated by drink on the night of the killings. The jury later disclosed in response to an observation of the trial judge that they were unanimously of the view that the killings would not have occurred if the appellant had not had so much to drink. The judge, however, ruled that the effect of the alcohol consumed by the defendant was to be ignored since the effect of the alcohol did not amount to an abnormality of mind

⁷⁵⁴ *The Times* 22 Jan.1960

⁷⁵⁵ [1962] Crim.L.R.836

⁷⁵⁶ *ibid* p.838

⁷⁵⁷ (1975) 61 Cr.App.R.261

due to inherent causes. Accordingly, he directed the jury that they must convict of murder if satisfied that the combined effect of the factors other than alcohol was insufficient to amount to a substantial impairment in the mental responsibility of the defendant.

On appeal, the Court of Appeal held that self-induced intoxication cannot of itself produce an abnormality of mind due to inherent causes and that the trial judge was not guilty of a misdirection when he told the jury to ignore the effect of alcohol. It did, however, hold that a case may arise where the defendant proves such a craving for drink or drugs as to produce in itself an abnormality of mind within the meaning of section 2(1), sufficient to form the basis of a defence of diminished responsibility. Undoubtedly, the court had in mind the case of the alcoholic who cannot resist alcohol, as falling within the diminished responsibility defence. This issue was to recur some years later in Tandy⁷⁵⁸.

Not long afterwards Turnbull⁷⁵⁹, charged with murder by stabbing, was convicted of murder after the jury was directed that it was for them to decide, weighing the evidence, which was the main factor for the killing, the defendant's inherent defect of mind (due to psychopathy) or the effect of alcohol. This is an entirely different direction to that given by the trial judge in Fenton since it requires a causal connection between the defendant's abnormality of mind and the killing. This is not a requirement of section 2 of the Homicide Act. On this view diminished responsibility *per se* would no longer be an exculpatory state as it is where intoxication is not in issue, unless the jury is satisfied that it caused the killing. The trial judge also asked the jury "[h]ave the defence satisfied you that it is more probable than not that Turnbull would have acted as he had on this night even had he not taken drink?" thus abandoning the requirement of causation and asking a question which is by its very nature, unanswerable.

⁷⁵⁸ (1988) 87 Cr.App.R.45

⁷⁵⁹ (1977) 65 Cr.App.R.242

On appeal it was held that the jury had been properly directed, but then the Court of Appeal went on to hold that the defendant must show that his abnormality of mind substantially impaired his mental responsibility for his acts and omissions notwithstanding the effect of the alcohol in causing loss of self-control, which is the direction that was given in Fenton. On this approach the jury would have to be directed that the defence is made out only if the defendant has proved that he would have been of diminished responsibility in the absence of intoxicants.

Disregarding evidence of intoxication when deciding the issue of diminished responsibility gives expression to the principle underlying Beard and Majewski that a person who voluntarily chooses to take an intoxicant which causes him to cast off the restraints of reason, conscience and volition should not afterwards be permitted to rely on his self-induced incapacitation when harm is caused to others. The concern underlying Turnbull and Fenton is that it would be only too easy for a defendant both to claim and to succeed in a claim that his responsibility was diminished because of intoxication⁷⁶⁰. The result of giving effect to these policy considerations through the medium of the diminished responsibility defence is that juries will have to be directed to take intoxication into account for the purpose of deciding whether the defendant had the specific intent required for murder (in accordance with Beard and Majewski) and to exclude intoxication from consideration in deciding whether his responsibility was diminished. This approach is both inconsistent and unprincipled as it treats intoxication as relevant to one aspect of *mens rea* but not relevant to another (that of diminished responsibility)⁷⁶¹.

Further objections to the Fenton approach are the complexity that a hypothetical issue of this nature creates and the accompanying substantial risk of confusion and error on the jury's part. Although speaking of Majewski, the observations of the Law Commission that "it is difficult to think that it operates in

⁷⁶⁰ F.Boland "Intoxication and Criminal Liability" (1996) 60 JCL 100 p.101

⁷⁶¹ Insanity is sometimes treated as connoting absence of *mens rea* presumably because although *mens rea* may be strictly present *mens rea* is viewed as requiring a guilty healthy mind. On this analysis diminished responsibility also connotes absent *mens rea*.

practice other than by its detailed rules being substantially ignored"⁷⁶² and "[t]he strong possibility is, therefore, that the *Majewski* rule works only because it is not properly applied; and that juries deal with cases not by applying the full complexities of the rule, and asking the hypothetical questions that it seems to demand, but by a more simple approach"⁷⁶³ are reservations that apply with equal force to a combined defence of intoxication and diminished responsibility. On a philosophical level one may object on the ground that an inquiry into the subjective mental state of a defendant can only be into his actual mental state and not into what that state might or would have been in different circumstances⁷⁶⁴.

In Gittens⁷⁶⁵ the defendant who had been suffering from depression and had taken alcohol and drugs, murdered his wife and then raped and murdered his step-daughter. He sought to raise the defence of diminished responsibility. The jury were directed that they must decide whether the substantial cause of the appellant's conduct was due to abnormality of mind due to inherent causes or whether it was due to drink or drugs. On appeal, defence counsel contended that that was not the problem which the jury were required to decide under section 2(1) of the Homicide Act, 1957. Doubting whether Turnbull went as far as asking the jury to decide what was the substantial cause of the defendant's behaviour, the Court of Appeal held *per curiam* that the direction approved in Turnbull, taken as a whole, was correct but was not a direction which should be followed in the future. Instead the Court of Appeal approved the approach in Fenton, saying that since abnormality of mind induced by drink or drugs was not, generally speaking, due to inherent causes and was not, therefore, within section 2(1), the jury should consider whether the combined effect of other matters which did fall within the subsection amounted to such abnormality of mind as substantially impaired the defendant's mental responsibility.

⁷⁶² *Intoxication and Criminal Liability*, Consultation Paper No.127 op cit para.3.24

⁷⁶³ ibid para.4.6

⁷⁶⁴ ibid para.3.20

⁷⁶⁵ (1984) 79 Cr.App.R.272

So far the decision appears straightforward but Professor Smith's commentary on the case has added another layer of complexity to this area of the law when he claimed that

"If the jury are to ignore the effect of drink or drugs they necessarily have to answer a hypothetical question, or perhaps two such questions. If the defendant had not taken drink and killed would he, because of the inherent causes have been under diminished responsibility? It may be, however that the jury will be of the opinion that, if the defendant had not taken drink or drugs, he would not have killed at all. In that case, it appears that the defence would not be open"⁷⁶⁶.

He concludes that the two questions for the jury in logical sequence are

Have the defence satisfied you on the balance of probabilities that, if the defendant had not taken drink-

- (i) He would have killed as he in fact did? And
- (ii) He would have been under diminished responsibility when he did so?⁷⁶⁷

The requirement that the defendant prove that he would have killed in the absence of intoxicants formed no part of the *ratio* in **Gittens**. Presumably, it is the fact that diminished responsibility only arises as a defence where there has been a killing which has led Professor Smith to ask this question. Unfortunately, the true answer to Professor Smith's hypothetical question can never be conclusively proved as this is a situation which has never happened. Its result is that the risk of jury confusion is compounded even further than under the **Fenton** approach⁷⁶⁸.

Admittedly the question may be relevant in the case of irresistible impulses, to the issue of the defendant's abnormality of mind in the absence of intoxicants and an inquiry into whether the defendant would have had an irresistible impulse to kill had

⁷⁶⁶ [1984] Crim.L.R.553 p.554

⁷⁶⁷ ibid

⁷⁶⁸ F.Boland "Intoxication and Criminal Liability" op cit p.103

he not taken drink or drugs may shed light on his probable mental condition in the absence of intoxicants⁷⁶⁹. However, in other cases such as mental illness or mental retardation this question gives us no insight into the defendant's likely state of mind in the absence of intoxicants and the jury is likely to answer it in the negative, denying the defence of diminished responsibility to an otherwise abnormal defendant with substantially impaired mental responsibility⁷⁷⁰. Professor Smith's approach may thus involve the suspension of the diminished responsibility defence when a defendant cannot prove to the satisfaction of the jury that he would have killed in the absence of intoxicants⁷⁷¹.

Nevertheless, Professor Smith's approach has been approved by the Court of Appeal in R v Atkinson⁷⁷². In his commentary to this case Professor Smith acknowledges that the task of the jury in answering two hypothetical questions is far from simple and that the answers given must be somewhat speculative, but he concludes that the present policy of the law of ignoring evidence of voluntary intoxication renders hypothetical questions inevitable.

Professor Smith's commentary has arisen again for consideration in Egan. There the trial judge invited the jury to consider whether

- (1) Drink or abnormality was the cause of the killing
- (2) Drink produced a disinhibiting effect upon the defendant which caused him to kill when otherwise he might not have.

The defendant appealed *inter alia* on the ground that the judge erred in directing the jury that if they thought no one could tell whether the murder would have happened without the intoxication then the defendant had failed in his defence of diminished responsibility. Defence counsel contended that the approval in Atkinson of Professor J.C.Smith's commentary on Gittens was *obiter* and misguided and that

⁷⁶⁹ ibid

⁷⁷⁰ See G.R.Sullivan "Intoxicants and Diminished Responsibility" [1994] Crim.L.R.156

⁷⁷¹ F.Boland "Intoxication and Criminal Liability" op cit p.103

⁷⁷² [1985] Crim.L.R.314

his suggestions were irreconcilable with the ratio of Gittens itself, which was that the issue for the jury was not one of choice between causes or substantial causes of the killing but whether the abnormality of mind substantially impaired the defendant's mental responsibility.

The Court of Appeal in Egan held that far from being *obiter*, Professor Smith's questions were central to the court's decision in Atkinson. Furthermore, the court felt that his questions were "most appropriate and ought to be applied generally"⁷⁷³. The court held that there was no misdirection by the trial judge and concluded that the judgments in Gittens and Atkinson should be regarded together as "representing the high authority on the troublesome subject of diminished responsibility where drink is a factor"⁷⁷⁴. Unfortunately, words such as these fail to emphasise the responsibility of the law on intoxication for producing the present unsatisfactory state of affairs and one may be forgiven for thinking that the blame lies with the defence of diminished responsibility⁷⁷⁵.

In his commentary on Egan, Professor Smith concedes that a jury may find it "particularly odd" that the defendant should have to prove that he would have committed the offence if he had not been intoxicated. He attributes this "oddity" partly to the fact that the onus of proving diminished responsibility is on the defendant and to the law's refusal to take intoxication into account in determining whether a person's responsibility is diminished although that intoxication may have diminished his responsibility in fact. He also claims that whenever a jury is directed to ignore some logically probative evidence of which it is aware, it is required to answer a hypothetical question⁷⁷⁶. Unfortunately, Professor Smith appears to have overlooked the difficulties that arise from the situation where a defendant is clearly of diminished responsibility in the absence of intoxicants but where he cannot prove that he would have killed in the absence of drink and drugs, thus involving the suspension of the

⁷⁷³ (1992) 95 Cr.App.R.278 p.286

⁷⁷⁴ ibid p.288

⁷⁷⁵ F.Boland "Intoxication and Criminal Liability" op cit p.103

⁷⁷⁶ [1993] Crim.L.R.131 p.132

diminished responsibility defence and the principle underlying it, that a man is less blameworthy when his responsibility is diminished.

It appears from Tandy that in the case of abnormality of mind arising from alcoholism alone, if the defendant has voluntarily chosen to take his first drink of the day he cannot maintain that the resulting abnormality is due to disease. In support of this view the trial judge asserted

"The choice [of the appellant whether to drink or not to drink on Wed March 5 1986] may not have been easy but..if it was there at all it is fatal to this defence, because the law simply will not allow a drug-user, whether the drug be alcohol or any other, to shelter behind the toxic effects of the drug which he or she need not have used"⁷⁷⁷ and later

"...but clearly she did take drink on March 5, and if she did that as a matter of choice, she cannot say in law or in common sense that the abnormality of mind which resulted was induced by disease"⁷⁷⁸.

The Court of Appeal approved this direction and stated that section 2(1) would not be available unless the defendant was a "chronic alcoholic" either with gross impairment of her judgment and emotional responses or where her drinking had become involuntary so that she was no longer able to resist the impulse to drink. Dismissing the appeal, the Court of Appeal noted that the defendant had chosen to drink vodka rather than her customary drink of cinzano and that she had been able to stop drinking although her supply of vodka was not exhausted.

McAuley describes as "suspect" the exclusion of individuals suffering from abnormality of mind due to drinking, where the initial consumption was voluntary⁷⁷⁹. He argues that if the logic of the analogous insanity rule is that the defendant has a good defence because his defect of reason was caused by a supervening illness, rather

⁷⁷⁷ (1988) 87 Cr.App.R.45 p.49

⁷⁷⁸ ibid

⁷⁷⁹ F.McAuley op cit p.164

than the drinking that gave rise to the illness, it seems to follow that a *Tandy*-type defendant, whose abnormality of mind was similarly induced, should have a good defence of diminished responsibility notwithstanding the fact that the supervening illness was brought on by the voluntary consumption of alcohol⁷⁸⁰. Since it is clear that a defendant who drinks in order to get himself into a state in which he knows he will kill is guilty of murder if he kills in that state⁷⁸¹, McAuley submits that there is no need for a special rule barring the defence in cases where the defendant's illness was triggered by voluntary intoxication⁷⁸². It appears harsh to exclude alcoholics like **Tandy** since they will usually consume alcohol before withdrawal symptoms arise or become distressing⁷⁸³. The alcoholic who waits until they became intolerable, leading to involuntary drinking is arguably no less culpable and therefore no more entitled to a diminished responsibility defence than the alcoholic who drinks before the onset of withdrawal symptoms in order to avoid their effect.

The judgment of the Court of Appeal in **Tandy** sets a very high standard for a diminished responsibility defendant to meet. As shown *above*, the psychopath is entitled to a diminished responsibility defence if he had substantial difficulty controlling his sadistic impulses. Why, therefore, should an alcoholic not be entitled to a defence of diminished responsibility if he had substantial difficulty controlling his impulse to drink?

The Criminal Law Revision Committee's 14th Report on Offences Against the Person⁷⁸⁴ has recommended that "evidence of voluntary intoxication adduced in relation to a defence should be treated in the same way as evidence of voluntary intoxication adduced to negative the mental element", in order to rectify the difficulties occasioned by the present law on intoxication. The C.L.R.C. was, however, assuming the continued existence of the **Majewski** rule, so that by virtue of their recommendation, intoxication could be taken into account in determining

⁷⁸⁰ *ibid* pp.164 & 165

⁷⁸¹ *A.G. for Northern Ireland v Gallagher* [1963] A.C.340

⁷⁸² F.McAuley op cit p.165

⁷⁸³ G.R.Sullivan "Intoxicants and Diminished Responsibility" op cit p.57

⁷⁸⁴ Criminal Law Revision Committee 14th Report *Offences Against the Person* Cmnd 7844 op cit para.277

whether the defendant was of diminished responsibility (which only applies to murder, a crime of specific intent) but could not be taken into account in relation to defences applying to an offence of basic intent. This would lead to unsatisfactory and inconsistent results, thus perpetuating the difficulties which at present pervade the law on intoxication and a preferable solution would be to follow the approach adopted by the High Court of Australia in O'Connor⁷⁸⁵ whereby evidence of intoxication is treated like any other evidence in deciding whether a defendant had *mens rea*. A logical extension of this principle would be to treat intoxication as part of the relevant evidence in deciding the issue of diminished responsibility or any other criminal law defence. The O'Connor approach which also applies in New Zealand, Hawaii and Indiana has proved satisfactory and its application in Australia has shown that the fears on which Majewski is based are unfounded⁷⁸⁶. However, this would not alter the Court of Appeal's requirement that an alcoholic defendant's initial consumption of alcohol be involuntary.

Arguably, the Majewski principle filters out the most deserving cases of an intoxication defence, and the assurance of a manslaughter conviction to those who kill without specific intent has the same practical result as a successful plea of diminished responsibility, making the criticisms voiced above are merely academic. Theoretically, the difficulty which arises when hospitalisation is necessary may be overcome by transfer to hospital from prison of those in need of psychiatric treatment. In reality however, the waiting list is long and transfer may take years⁷⁸⁷. Furthermore, there are, undoubtedly, mentally abnormal murderers who, although intoxicated at the time of the killing, are deserving of a defence of diminished responsibility and who *do* have the specific intent required for murder when they kill.

The legal position of a defendant who is surreptitiously administered drink or drugs and who kills while suffering from diminished responsibility due to a combination of intoxicants and another abnormality of mind has yet to be settled. Will

⁷⁸⁵ (1980) 54 A.L.J.R.349

⁷⁸⁶ See The Law Commission *Intoxication and Criminal Liability* Consultation Paper No.127 op cit pp.59-61

⁷⁸⁷ This is discussed further in section 3.10 *below*

the defendant be required to prove that he would have killed in the absence of intoxicants or will he have the slightly less onerous burden of proving that he would have been of diminished responsibility without the influence of drink or drugs? The recent decision of the House of Lords in Kingston which has signalled a return to common law principles⁷⁸⁸, suggests that the principle underlying the defence of diminished responsibility will be given expression where involuntary intoxication has contributed in part to the defendant's abnormality of mind.

Because of the Legislature's failure to delimit the scope of the defence of diminished responsibility and the law's antagonism to evidence of intoxication, the elucidation of the law where intoxication and diminished responsibility occur concomitantly has been slow. The present position, requiring a defendant to prove that he would have killed even in the absence of intoxicants and that he would have been suffering from diminished responsibility regardless of their effect, is unsatisfactory for its complexity and the impossible question which it asks the jury. The further requirement in the case of alcoholism, that the initial consumption of alcohol be involuntary, sets a very high standard for the defendant in a diminished responsibility trial to meet and is inconsistent with the standard of control expected of the psychopath. The problems discussed above arise from the nature of the present law on intoxication and the law's antagonism to the defendant who mounts a defence based on intoxication. These problems do *not* stem from any defect in the diminished responsibility defence, which works well in cases where intoxication is not involved. As the Majewski principle is accorded precedence where intoxication and diminished responsibility occur together, whatever solution is adopted to remedy the difficulties of a joint diminished responsibility/intoxication defence must have its origin in the law of intoxication⁷⁸⁹.

⁷⁸⁸ F.Boland "Involuntary Intoxication is Not a Defence" op cit

⁷⁸⁹ See F.Boland " Intoxication and Criminal Liability" op cit for a discussion of the Law Commission's recent proposals for reform of this area of the law.

2.9 CONCLUSION

The above discussion reveals that, despite its hasty introduction, the operation of the diminished responsibility defence has been successful in all cases except where intoxication and diminished responsibility combine - where its only failing is that it is sacrificed to the supposed lesser evil of excluding evidence of intoxication or treating a defendant under its effects more harshly. In the course of demonstrating the merits of the defence, this Chapter has examined the diminished responsibility defence in relation to the other criminal law defences of automatism, insanity and provocation. In reality, however, the defence applies across a vast spectrum of human behaviour. "An "abnormal state of despair" induced by the need to care for an imbecile child or by a diagnosis of cancer in a beloved relative, leading in each case to a "mercy killing"; "a reactive depressed state" associated with the breaking of an engagement or the discovery of unfaithfulness in a spouse; "mixed emotions of depression, disappointment or exasperation" causing a "lack of control" over the defendant's actions in similar circumstances; inability to hold down a job; even an attempt at suicide *after* the commission of the offence charged - all of these have been adduced as at least contributory evidence of diminished responsibility"⁷⁹⁰.

By remedying the limitations of the criminal law defences of automatism and provocation, diminished responsibility has emerged as a vehicle for humanely dealing with murderers when the circumstances surrounding the killing arouse strong feelings of sympathy and the defendant is not felt to merit the mandatory life sentence and the stigma of a murder conviction. The defence has also alleviated the pressure on the criminal law to recognise conditions like P.M.T. as exculpatory excuses resulting in an outright acquittal. There are clear limits to the law's ability to recognise social and emotional pressures without denying its own rationale as a punitive mechanism relying on individual responsibility⁷⁹¹. By hiving off the likes of infanticide, killing during domestic strife and mercy killing into a category of crime with a less severe penalty than for murder and by presenting the issue in medical terms, the law has been

⁷⁹⁰ Lady Wooton "Diminished Responsibility: a Layman's View" (1960) 76 L.Q.R.224 p.229

⁷⁹¹ A.Norrie op cit p.189

able to maintain a punitive stance to the social problem, laced with an unthreatening show of compassion⁷⁹².

The defence has also remedied several shortcomings of the McNaghten Rules. Its discretionary disposal consequences which provide a vehicle for responding to the individual defendant's needs has meant that defendants have chosen to plead diminished responsibility over insanity in order to avoid mandatory indefinite hospitalisation. The defence has also dealt with abnormalities of mind which failed to meet the standard of McNaghten madness and which would otherwise have led to the mandatory life sentence (or capital punishment) because of the law's failure to recognise the abnormality in question as an excusing condition.

The recognition of irresistible impulses as a species of diminished responsibility has ended over a century of controversy over the McNaghten Rules and resolved the medico/legal conflict that pervaded discussions of the insanity defence. The resolution of this conflict stems from the deference that the diminished responsibility defence shows to the medical viewpoint of abnormality of mind. The psychiatrist's view is accepted in the 80% or so cases where the judge accepts the medical testimony outright and the case does not go to trial. In the remaining 20% of cases the defence has emerged as a forum for psychiatric testimony which is given greater credence than previously under the Rules. At the same time the court retains its seisin of the case⁷⁹³. In exceptional circumstances the case may still be sent to trial despite unanimous psychiatric evidence of mental abnormality⁷⁹⁴. Dell found that 1.5% of cases went to trial because the judge or prosecution thought it appropriate for the issue to be decided by a jury, even though the medical evidence was unanimously in favour of a diminished responsibility finding⁷⁹⁵. The result has been the emergence of the legal and medical professions from a state of cold war to an entente cordiale. Satisfaction with the diminished responsibility defence has been such that it has

⁷⁹² ibid

⁷⁹³ ibid p.190

⁷⁹⁴ An example is the case of *Peter Sutcliffe* discussed in H.A.Prins "Diminished Responsibility and the Sutcliffe Case: Legal, Psychiatric and Social Aspects (A 'Layman's' View)" (1983) 23 Med, Sci & L.17

⁷⁹⁵ S.Dell *Murder into Manslaughter* op cit p.26

entirely usurped the McNaghten Rules. Figures for 1993 show that while one homicide defendant was found insane, fifty three were found guilty of diminished responsibility manslaughter⁷⁹⁶. This has led to almost a disappearance of the old McNaghten debate. As Hart has commented

"the change made by the introduction of diminished responsibility was both meagre and half-hearted. Nonetheless it marked the end of an era in the criticism of the law concerning the criminal responsibility of the mentally abnormal"⁷⁹⁷.

⁷⁹⁶ Criminal Statistics, 1993, table 4.2

⁷⁹⁷ H.L.A. Hart op cit p.193

CHAPTER THREE

THE IRISH POSITION ON INSANITY

"The impossibility of guaranteeing that a new rule will always be infallible cannot justify continued adherence to an outmoded standard, sorely at variance with enlightened medical and legal scholarship"⁷⁹⁸.

3.1 THE MCNAGHTEN RULES AND IRRESISTIBLE IMPULSE

The success of the English diminished responsibility defence in abating the controversy over the insanity defence and resolving the medico-legal conflict raises the question of its necessity in Irish law. The obvious starting point is the Irish insanity defence, whose controversial nature has surpassed that of its English counterpart. In this Chapter I will examine the evolution of the insanity defence in Ireland to encompass both the McNaghten Rules and a modified form of the defence of irresistible impulse, whose origins have been discussed in Chapter One. After tracing the Irish constitutional developments which the metamorphosis of the insanity defence mirrored, I will focus on its unsatisfactory and controversial nature. Particular emphasis will be placed on its questionable constitutionality and its failure to conform with the European Convention on Human Rights.

In recent years there have been several calls, in particular from the Judiciary, for a diminished responsibility defence in Ireland. Having illustrated the increased weight of opinion in favour of an Irish defence of diminished responsibility, I will examine the failure of both Judiciary and Legislature to provide for this defence. After looking at several justifications for a defence of diminished responsibility, philosophical and other, I will conclude by examining how an Irish diminished responsibility defence can improve on its English counterpart. This involves a consideration of its wording and other procedural matters including disposal.

⁷⁹⁸ *US v Freeman* (1966) 357 F.2d.606 p.624

Following independence in 1922, it was uncertain to what extent Ireland was bound by the McNaghten Rules. The Act of Union, 1800 had established the House of Lords in Westminster as the lawful forum for final appeals from Ireland. The Rules were laid down not long after in 1843. In Chapter One I have looked at the challenge which was mounted to the McNaghten Rules from the 1850's and onwards by the notion of impulsive insanity. By the first decade of this century the notion of irresistible impulse had shaken the previously firm foundation of the Rules. Despite the acceptance of irresistible impulse in several English Court of Appeal decisions, the House of Lords had remained silent on the issue. Whether the Rules were binding on the Irish courts by virtue of the doctrine of *stare decisis*, or whether they were free to adopt irresistible impulse (which had yet to be rejected by the English Court of Appeal in a series of cases spanning the years 1921-1936), had yet to be decided by the Irish courts.

It was not until 1933 however, that irresistible impulse first arose for consideration in the Irish courts⁷⁹⁹. The jury returned a special verdict on a homicide charge although Sullivan P. categorically rejected that irresistible impulse was a defence in Irish Law.

The same issue arose again in A.G. v O'Brien⁸⁰⁰. O'Brien had shot and killed his sister-in-law's husband in the presence of witnesses. At his trial he claimed that he had no recollection of anything that had happened at the relevant time and medical evidence was tendered to this effect. He was convicted of murder and appealed on the ground that the trial judge had erred in law by not putting the defence of irresistible impulse to the jury.

After discussing the McNaghten Rules, the fact that the questions submitted to the judges were limited to delusions and the dissatisfaction of both legal and medical professions with their application to the whole field of insanity, Kennedy C.J. in the

⁷⁹⁹ *A.G. v O'Connor* [1933] L.J.Ir.130

⁸⁰⁰ [1936] I.R.263

Court of Criminal Appeal considered Article 28 of Sir James Fitzjames Stephen's *Digest of the Criminal Law*, where he stated

"No act is a crime if the person who does it is at the time when it is done prevented (either by defective mental power or) by any disease affecting his mind

(a) from knowing the nature and quality of his act or

(b) from knowing that the act is wrong; (or

(c) from controlling his own conduct, unless the absence of the power of control has been produced by his own default)

"But an act may be a crime although the mind of a person who does it is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act".

Despite the presence of a footnote where Sir James states that the parts of the article bracketed are doubtful and the recent body of judicial authority in England which weighed against recognition of irresistible impulse as a defence, Kennedy C.J. held

"we have not here an occasion to decide the question whether in law, if established in fact, irresistible impulse affords a defence to a criminal charge. The determination of that question must remain for a suitable occasion"⁸⁰¹.

In the course of his judgment Kennedy C.J. recognised the confines of the Judiciary who can only ascertain and declare the law as it is and he stipulated that change in the law could only come from the "Legislature competent to alter or adapt it in the light of the latest science and of the conditions of the time in which we live"⁸⁰².

Although Kennedy C.J. commented that the evidence for the defence was directed substantially towards satisfying the conditions of the Rule in McNaghten's

⁸⁰¹ ibid p.272

⁸⁰² ibid p.271

case he did not approve McNaghten as part of Irish law. In this manner O'Brien left open the possibility of change by leaving the status of the defence of irresistible impulse uncertain.

O'Brien was followed shortly afterwards by A.G. v Patrick Boylan⁸⁰³. Boylan who slit his girlfriend's throat, appeared to know both the nature and quality of his act and its legal wrongness from words spoken just after the incident: "I have cut her throat. Leave me alone, I want to get in to kiss her before she dies" and " I know what I done, I will swing for it". In his statement to the police Boylan claimed to remember nothing from just prior to the incident. At his trial he claimed that his memory loss included the period of detention in custody and accordingly, the above statement to the police.

Three medical witnesses testified that a brain injury which the defendant had sustained six years before could have diminished his power of control when combined with alcohol and emotional stress. One witness felt that these factors could prevent him from knowing what he was doing (ie. the nature and quality of his act) and another felt that these would prevent him from knowing that what he was doing was wrong. That the medical evidence was vague and unconvincing is obvious from the question asked by the trial judge, O'Byrne J., to one of the medical witnesses:-

"As I understand your evidence, Doctor, and please correct me if I am wrong, it amounts entirely to this: the man at the time he did the act may have known what he was doing, or he may not, and he may have known it was wrong, or he may not, and I am not in a position to tell you one way or the other?"

The Doctor's answer was "yes"⁸⁰⁴.

Not surprisingly, the accused was found guilty and sentenced to death. Boylan applied to the Court of Criminal Appeal for leave to appeal, contending *inter alia* that

⁸⁰³ [1937] I.R.449

⁸⁰⁴ ibid pp.459 & 460

the trial judge had misdirected the jury by telling them that in considering if the prisoner was insane at the time of committing the act, they had only to determine if he knew the nature and quality of the act and that the act was wrong. The accused also contended that the trial judge should have told the jury that if they were satisfied that by reason of mental disease Boylan was prevented from controlling his actions, that would establish insanity even if the accused knew the nature and quality of his act and knew that he was doing wrong.

Sullivan C.J., speaking on behalf of the Court of Criminal Appeal, held that there was no evidence from which the jury could have found that the accused was incapable of controlling his act and that no such evidence could be given by him if it was true, as he alleged, that he had forgotten everything relating to the murder. In so deciding, the court declined to express any opinion on the question whether, if irresistible impulse had been established, it would afford any defence to the charge.

Sullivan C.J. commented that if the jury had accepted the evidence of Dr.Rutherford they would have held that the accused did not know what he was doing, and they would have found that he was "insane" as defined by the judge in his charge. If they accepted Dr.Coyne's theory they would also have found that he was insane, as Dr.Coyne stated that if the accused was mildly confused that would not prevent him from knowing what he was doing, but that it would definitely prevent him from knowing that what he was doing was wrong. Nonetheless, the Chief Justice did not explicitly approve McNaghten as part of Irish law.

A flurry of constitutional law cases followed the decision in Boylan and these throw some light on the status of the McNaghten Rules in Ireland. In the first of these, Exham v Beamish⁸⁰⁵, Gavan Duffy J. suggested that only those decisions which had been accepted as being part of Irish law before 1922 were binding on Irish judges by virtue of the doctrine of *stare decisis*. The number of years which had elapsed between the McNaghten decision and independence makes it likely that the Rules had been adopted as part of Irish law in at least some pre-1922 decision and so would

⁸⁰⁵ [1939] I.R.336

satisfy Gavan Duffy J's. requirement. Gavan Duffy J. then provided for an exception to the principle of precedent "[i]f, before the Treaty, a particular law was administered in a way so repugnant to the common sense of our citizens as to make the law look ridiculous"⁸⁰⁶. In such circumstances, he noted,

"it is not in the public interest that we should repeat the mistake. Our new High Court must mould its own *cursus curiae*; in so doing I hold that it is free, indeed bound, to decline to treat any such absurdity in the machinery of administration as having been imposed on it as part of the law of the land"⁸⁰⁷.

Any impetus that this *dictum* might have provided for declining to follow or altering the McNaghten Rules was dealt a blow by the Supreme Court judgments of Maguire C.J. and Black J. in **Boylan v Dublin Corporation**⁸⁰⁸ where they considered all pre-1922 decisions to be binding. This view was taken soon afterwards by Murnaghan J. in **Minister for Finance and A.G. v O'Brien**⁸⁰⁹. These two decisions are likely to have provided final confirmation that the McNaghten Rules were the test of insanity in Irish law.

Another attempt to establish irresistible impulse as part of Irish law was made in **The People (A.G.) v Micheal Manning**⁸¹⁰ where the accused was convicted of murdering a sixty five year old woman by stuffing grass in her mouth in the course of an unsuccessful attempt at rape upon her. Evidence was given that he had consumed about eight and a half pints of stout prior to the incident. In the absence of medical evidence of insanity, the trial judge directed the jury that it was difficult to see on what evidence they could bring in a special verdict of guilty but insane within the McNaghten Rules. When the jury retired, counsel for the accused made several objections to the charge and requested the judge to recall the jury and tell them that

⁸⁰⁶ ibid p.349

⁸⁰⁷ ibid

⁸⁰⁸ [1949] I.R.60

⁸⁰⁹ [1949] I.R.91

⁸¹⁰ (1955) 89 I.L.T.R.155

irresistible impulse was a possible defence. This the trial judge refused to do and the jury found the accused guilty of murder.

The accused applied to the Court of Appeal for leave to appeal on the ground *inter alia* that the judge erred in law in not leaving the defence of irresistible impulse to the jury. Maguire J., speaking on behalf of Haugh and Dixon JJ., held that the insanity defence was put clearly and adequately by the trial judge to the jury and that

"there was no evidence on which this defence (if it is a defence in law) could have been left to the jury..The determination of the question whether or not this defence is available in law must be left, as it was in the case of *A.G. v O' Brien*..for a suitable occasion if and when it arises"⁸¹¹.

In The People (A.G.) v Vincent McGrath⁸¹² the accused was convicted of murder in the Central Criminal Court before Budd J. and a jury. He had walked up to the deceased and struck a blow on his head with his fist, in which he held a gimlet.

One medical witness expressed the opinion that the defendant was suffering from mental disease as a result of which, at the time he did the act, he passed from his conscious mind under control to his subconscious mind not under control and that the defendant did not know the nature and quality of the act. The second witness felt that the accused knew the nature and quality of his act but did not know that what he was doing was legally wrong. Controversy later arose from his words "What was in his mind God only knows. I don't know..It was a momentary impulsive act not backed by reason for control or discrimination" and from his description of the act as "an insane or irresistible thing".

On appeal against his conviction for murder, the Court of Criminal Appeal noted that the trial judge had allowed the jury to consider irresistible impulse to the

⁸¹¹ ibid pp.158 & 159

⁸¹² 1 Frewen 192

same extent as that expressed by Lord Tucker in A.G. for South Australia v Brown⁸¹³, i.e. as *evidence* of insanity within the McNaghten Rules, but they declined to approve Brown as they had not been called on to do so. The court asserted that neither of the mental specialists examined had expressed the opinion that the accused acted on an uncontrollable impulse and that there was no evidence upon which the jury would be entitled to consider irresistible impulse *per se* in this case.

Once again the Court of Criminal Appeal had evaded the issue but it appeared that the Legislature might at last take action when the Programme of Law Reform presented in 1962 promised a review of the McNaghten Rules.

"It has been suggested that the rules, which were laid down in 1843, require to be modified in the light of improved knowledge of mental disorders. This is an exceedingly complex matter and may require investigation by an expert committee. It may be that it will be found on investigation that the present rules, defective though they are, do in fact operate or are made to operate so as to cause no injustice to accused persons relying on insanity as a defence, and that more harm than good would be done by amending them; but at any rate the matter is important enough to deserve thorough examination"⁸¹⁴.

However the restriction of the death penalty for murder by the Criminal Justice Act, 1964, removed the sense of urgency and no expert committee was appointed⁸¹⁵.

In 1965 in the State (Quinn) v Ryan⁸¹⁶, the Supreme Court broke with the tradition of *stare decisis* by declaring unconstitutional, a statutory provision which it had previously declared constitutional in the case of the State (Duggan) v Tapley⁸¹⁷. In the course of his judgment (in which the other members of the court concurred),

⁸¹³ [1960] 2 W.L.R.588

⁸¹⁴ Quoted by N.Osborough "McNaghten Revisited" (1974) 9 Ir.Jur.76 p.77

⁸¹⁵ ibid

⁸¹⁶ [1965] I.R.70

⁸¹⁷ [1952] I.R.62

Walsh J. rejected the proposition that the Supreme Court, in interpreting the Constitution of 1937, would be bound to follow previous decisions, stating

"this Court is the creation of the Constitution and is not in any sense the successor in Ireland of the House of Lords..I reject the submission that because upon the foundation of the State our Courts took over an English legal system and the Common Law that the Courts must be deemed to have adopted and should now adopt an approach to Constitutional questions conditioned by English judicial methods and English legal training which despite their undoubted excellence were not fashioned for interpreting written constitutions or reviewing the constitutionality of legislation"⁸¹⁸.

Then in A.G. and Another v Ryan's Car Hire Co. Ltd⁸¹⁹ the Supreme Court extended their more liberal approach beyond the confines of constitutional issues which a strict interpretation of The State (Quinn) v Ryan suggested⁸²⁰. Kingsmill Moore asserted

"It seems clear that there can be no legal obligation on this Court to accept "*stare decisis*" as a rule binding upon it just because the House of Lords accepted it..A decision which is only purported to affect the House of Lords could not, by virtue of Article 73 of the Constitution of 1922, have been carried over into our law so as to bind the Supreme Court set up by that constitution; and if that Supreme Court in fact adopted the rule (as it would seem to have done..) any such determination could only bind that Court and would not under Art 50 of our present Constitution be binding on the new Supreme Court created by Art 34,4 of our present Constitution and the Courts (Establishment and Constitution) Act, 1961"⁸²¹.

⁸¹⁸ [1965] I.R.70 p.126

⁸¹⁹ [1965] I.R.642

⁸²⁰ Grimes and Horgan *Introduction to Law: Ireland* (Dublin, 1981) p.61

⁸²¹ [1965] I.R.642 p.654

The learned judge was of the opinion that an approach less rigid than that of the House of Lords was more appropriate for the Irish Supreme Court:

"In my opinion the rigid rule of *stare decisis* must in a Court of ultimate resort give place to a more elastic formula. Where such a Court is clearly of opinion that an earlier decision was erroneous it should be at liberty to refuse to follow it, at all events in exceptional cases"⁸²².

The above decisions untied the Court's hands which had previously been bound by the doctrine of *stare decisis* and allowed it to depart from precedent where there are "exceptional" and "compelling" reasons. However the Irish Supreme Court was not ready to utilize its newly acquired powers when a revision of the McNaghten Rules arose again for consideration in People (A.G.) v Michael McGlynn⁸²³. Here the accused was charged with several offences, including the possession of a firearm with intent to endanger life, possession of firearms without holding a firearm licence, breaking and entering a garage and stealing petrol and entering a dwelling-house and stealing a shotgun and other articles therein.

The only witness called for the defence was a psychiatrist who tendered evidence that the accused was suffering from schizophrenia at the time of the commission of the alleged offences and that his responsibility for his acts was thereby diminished. Counsel for the defence asked the trial judge to rule that in the present state of medical science the McNaghten Rules are not a proper statement of the law and that there is now in law a defence known as diminished responsibility. He also requested the judge to adopt in lieu of McNaghten, the following formula, worked out the American Law Institute and approved of by the U.S. Federal Court of Appeals in People v Freeman viz:-

⁸²² *ibid*

⁸²³ [1967] I.R.232

"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 wrongfulness of his conduct or to conform his conduct to the requirements of law"⁸²⁴.

The President of the Circuit Court stated a case for the consideration of the Supreme Court pursuant to section 16 of the Courts of Justice Act, 1947, at the conclusion of the evidence for the defence and before counsel had addressed the jury. The President was inclined to the view that decisions of the Court of Criminal Appeal and the rulings and practice of the Central Criminal Court bound him to hold that the McNaghten Rules stated fully the legal principles at present applicable to the defence of the accused, but he added that if he did not feel so bound he would charge the jury to the effect that the law is in harmony with modern medical science and in general on the principles adumbrated in the Freeman Case.

The Supreme Court raised two preliminary points to their consideration of the question put before them: Firstly, the jurisdiction of the Circuit Court judge to state the case and secondly, such jurisdiction, once the case was given in charge of the jury.

Not surprisingly, the Supreme Court found a way to evade consideration of the issue by stating that the Circuit Court judge had no jurisdiction to state the case once the prisoner had been given in charge of the jury. It then ceased to be "a matter pending before a Circuit Court Judge" as referred to in section 16 of the Courts of Justice Act, 1947.

That Irish lawyers were more impressed by the American attempts to reformulate the insanity defence at this time than by developments in English law, is evident from McGlynn where, although diminished responsibility was raised by the defence, the trial judge did not refer this issue to the Supreme Court, preferring instead to concentrate on the proposed reformulation of the insanity defence along the lines of that contained in the American Model Penal Code. This decision is just one of

⁸²⁴ Quoted ibid p.236

many instances where English precedent was repudiated in favour of American jurisprudence, reflecting the emergence of Irish nationalism as a legal ideology⁸²⁵. This was fuelled by the desire of the Irish Judiciary to release the Irish legal system from the state of almost servile dependency on English judicial developments, into which it had lapsed since independence⁸²⁶. The beginnings of this ideology can be seen as far back as Gavan Duffy J's. *dictum* in **Exham v Beamish** and it reached its high water mark during the 1960's with the judgment of Walsh J. in **State (Quinn) v Ryan** who, rejecting the rigid doctrine of *stare decisis*, said

"In this State one would have expected that if the approach of any Court of final appeal of another State was to have been held up as an example for this Court to follow it would more appropriately have been the Supreme Court of the United States rather than the House of Lords"⁸²⁷.

However, it was not until the end of the 1960's that a reformulation of the Irish insanity defence was adopted by an Irish judge, when Henchy J. accepted a control test as part of Irish law in **The People (A.G.) v Hayes**⁸²⁸. Hayes, who was charged with the murder of his wife, was not professionally represented. Submissions were made to the trial judge by counsel on behalf of the Attorney General, as to the form in which the issue of insanity should be left to the jury. Henchy J. acknowledged the shortcomings of the McNaghten Rules, saying

"In the normal case, tried in accordance with the McNaghten rules, the test is solely one of knowledge; did he know the nature and quality of his act or did he know that the act was wrong? The rules do not take into account the capacity of a man on the basis of his knowledge to act or to refrain from acting and I believe it to be correct psychiatric science to accept that certain serious mental diseases such as paranoia

⁸²⁵ See generally G.W.Hogan "Irish Nationalism as a Legal Ideology" (1986) 75 Studies 528

⁸²⁶ *ibid* p.532

⁸²⁷ [1965] I.R.70 p.126

⁸²⁸ *Irish Times* 12 Oct.1974

or schizophrenia, in certain cases enable a man to understand the morality or immorality of his act or the legality or illegality of it, or the nature and quality of it, but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act"⁸²⁹.

He went on to hold that

"if it is open to the jury to say, as say they must, on the evidence that this man understood the nature and quality of his act, and understood its wrongfulness, morally and legally, but that nevertheless he was debarred from refraining from assaulting his wife fatally because of a defect of reason due to his mental illness, it seems to me that it would be unjust, in the circumstances of this case, not to allow the jury to consider the case on those grounds"⁸³⁰.

This however, was a decision of the High Court, departing from established authority which only the Supreme Court was entitled to do. Supreme Court confirmation was required before irresistible impulse could be considered to be part of Irish Law.

The following year in the case of James Coughlan⁸³¹ Kennedy J. in the Central Criminal Court gave as his view that the issue for the jury in any case where the plea of insanity was relied on was the following - "*Was the act caused by disease of the mind?*". He proposed to leave that broader issue to the jury, while stating by way of example of acts caused by disease of the mind which exempted from criminal responsibility, the three cases cited by Sir James Stephen - where the accused didn't know the nature and quality of his act, its wrongness or was prevented by defective mental power or by any disease affecting his mind from controlling his own conduct, unless the absence of the power of control was produced by his own default⁸³².

⁸²⁹ Quoted in *Doyle v Wicklow County Council* [1974] I.R.55 p.71

⁸³⁰ *ibid*

⁸³¹ *Irish Times* 28 Jun.1968

⁸³² Professor R.O'Hanlon "Not Guilty Because of Insanity" (1968) 3 Ir.Jur.61 p.76

Coughlan had attacked a twelve-year-old boy and his eight-year-old sister while they were walking beside a stream, had knocked them into the river and had held the boy under the water until he drowned. Coughlan had suffered from schizophrenia since he was a child.

Here Kenny J. went a step further in his decision than Henchy J. had in Hayes, as this criterion does not necessarily confine the defence of insanity within the bounds of the three tests laid down by Sir James Stephen, but recognizes the possibility of a valid defence of insanity being raised, even in a case which doesn't appear to fall strictly within the Stephen formula⁸³³. Not surprisingly, the jury returned a verdict of guilty but insane after an absence of only ten minutes.

There does not appear to be any recorded case in which Coughlan has been approved⁸³⁴ and in A.G. v McDonagh⁸³⁵ Gannon J. told the jury that

"if it be established by evidence to your satisfaction that at the time of committing the act the will of the accused was so defective that he was unable to control his actions and that such defect of will was due to mental illness the proper verdict would be guilty but insane"⁸³⁶.

The accused, a butcher, had an argument with a neighbour outside his house. He went into his own house, went up to his bedroom and took a butcher's knife from the top of his wardrobe, came out again and stabbed his neighbour, killing him instantly. A psychiatrist gave evidence for the defence that at the time of the killing the accused was responding to auditory delusions in a psychotic state. So powerful and so intense was the pressure on his mind that he did not have control over his volition. Gannon J., having dealt with the McNaghten Rules, charged the jury in the above terms. After retiring to consider their verdict, the jury returned to court and asked to be furnished with a copy of the McNaghten Rules. This was given to them

⁸³³ ibid pp.76 & 77

⁸³⁴ F.McAuley *Insanity, Psychiatry and Criminal Responsibility* (Dublin, 1993) p.14

⁸³⁵ [1973] 107 I.L.T.R.169

⁸³⁶ ibid

and they retired again. The jury returned a second time to ask a question about the law applicable where the will is defective through mental illness, and Gannon J. repeated the passage quoted above. The jury retired and came back with a verdict of guilty but insane.

It was Henchy J's. *dictum* which the Supreme Court opted to approve in Doyle v Wicklow County Council⁸³⁷. The applicant applied to the respondents for compensation under the criminal injury code, after a seventeen year old set fire to his abattoir. At the hearing of the application in the Circuit Court it was established that the youth had caused the damage deliberately with the intention of damaging or destroying the applicant's abattoir. The issue was whether the boy had been capable of forming the requisite "malicious intention" because of his alleged insanity.

The medical evidence given was to the effect that the boy O., was suffering from a mental disorder which led him to believe that he shouldn't be charged or punished for setting the fire, although he knew his act was one forbidden by society or contrary to law. His reason for this belief was his love of animals, the killing of which he was very much opposed to. Dr.Noel Browne, the defendant's medical witness, was of the opinion that O. believed his act was right and that the doing of that act showed that O's. judgment was distorted and he was emotionally disturbed, and to that extent he could not be called sane, and he needed psychiatric treatment and detention.

The Circuit Court stated a case to the Supreme Court asking, *inter alia*:- Where on the trial of an application for compensation for criminal injury, there is evidence of the insanity of the person who caused the damage at the time he did so, should the judge determine the issue of insanity as an issue of fact solely on the evidence offered, or should he in addition apply the principles laid down in McNaghten's case.

The Supreme Court ruled that the judge, in determining such issue of insanity, should apply the standards or rules appropriate to a criminal trial and that

⁸³⁷ [1974] I.R.55

"the McNaghten Rules do not provide the sole or exclusive test for determining the sanity or insanity of an accused. The questions put to the judges were limited to the effect of insane delusions and I would agree with the opinion expressed by the Court of Criminal Appeal in *AG v O'Brien* that the opinions given by the judges must be read with the like specific limitation"⁸³⁸.

This appears to have been a *sub silentio* rejection of R v Windle⁸³⁹ which held that the McNaghten Rules govern the entire law of insanity, not just instances of insane delusion⁸⁴⁰.

Griffin J., speaking on behalf of the Supreme Court, then approved Hayes as the correct test to be applied by the Circuit Court judges in determining whether the act was malicious or not. He noted that a civil case was not the most appropriate circumstance in which to consider the application of rules which have been widely applied in criminal trials for upwards of 130 years but that the enactment of the Criminal Justice Act, 1964 (abolishing the death penalty with certain exceptions) made it less likely that the Supreme Court would be required to consider the McNaghten Rules in a criminal appeal.

It is noteworthy that nowhere in the Supreme Court judgment is there any mention of the requirement of an impulse. This is in keeping with the recommendation of the Gowers Commission that

"If..the M'Naghten Rules are to be extended by the addition of a third limb to meet the case of insanity affecting not the reason but the will, it is important that this should be formulated not merely in terms of inability to resist an impulse, but in wider terms, which will allow the court to take account of those cases where an insane person commits a

⁸³⁸ ibid p.70

⁸³⁹ N.Osborough op cit p.78

⁸⁴⁰ [1952] 2 All E.R.1

crime after a long period of brooding and reflection or is gradually carried towards it without any real attempt to resist this tendency"⁸⁴¹.

The Court approved Henchy J's. test *verbatim* that certain

"serious mental diseases such as paranoia or schizophrenia, in certain cases enable a man to understand the morality or immorality of his act or the legality or illegality of it, or the nature and quality of it, but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act"⁸⁴².

and that insanity should be made out where a defendant

"understood the nature and quality of his act and understood its wrongfulness, morally and legally, but..nevertheless..was debarred from refraining from [committing the act] because of a defect of reason, due to his mental illness"⁸⁴³.

It is not entirely clear whether the control test is to be interpreted literally or liberally. McAuley asserts that a literal stance may have been taken by the Supreme Court, as evidenced by Griffin J's. opinion, although *obiter*, that a satisfactory defence of insanity had not been made out in *Doyle*⁸⁴⁴. His opinion is that the judge's misgivings appear to have stemmed from the fact that the claim that the boy was unable to control his behaviour was not easy to reconcile with the uncontested evidence that he was determined to burn down the abattoir⁸⁴⁵. McAuley points out that the fact that a defendant was determined to do something does not entail and may exclude the conclusion that he was unable to refrain from doing the act, under a literal interpretation of the control test⁸⁴⁶. This approach may result in depressives, drug

⁸⁴¹ Report of the Royal Commission on Capital Punishment (1949-53) Cmd 8932 para.315

⁸⁴² [1974] I.R.55 p.71

⁸⁴³ *ibid*

⁸⁴⁴ F.McAuley op cit p.45

⁸⁴⁵ *ibid*

⁸⁴⁶ *ibid*

addicts and even schizophrenics (the very offenders envisaged by Henchy J.) being held responsible if there is any evidence of planning or purposive action involved⁸⁴⁷.

The writer's view however, is that the fact that a defendant was determined to do something does not preclude the conclusion that his act was uncontrollable⁸⁴⁸, although it may show that his act was not impulsive⁸⁴⁹. This should not lessen the success prospects of an insanity plea which uses the control test, as nowhere in the Supreme Court judgment does it mention the requirement of an uncontrollable "impulse"⁸⁵⁰. My view is that the Irish defence of volitional insanity may indeed be very wide. This view is given weight by the *obiter* of Finlay C.J. in the Supreme Court decision of D.P.P. v Mahony⁸⁵¹ where he observed that the appellant in the English Court of Appeal decision R v Byrne⁸⁵², a sexual psychopath who suffered from violent perverted sexual desires which he found difficult or impossible to control, if tried in accordance with the law of Ireland on the same facts, would have been properly found to be not guilty by reason of insanity. This statement suggests that substantial difficulty in controlling one's acts, as opposed to an inability, will lead to a successful plea of volitional insanity.

On the assumption that McNaghten is limited to cases of delusion since Doyle, its harshness is greatly alleviated by its narrower application than in England and there is no danger that "disease of the mind" will be interpreted, as in England, to include epileptics, diabetics in a state of hyperglycaemia and sleep-walkers. However it remains a very narrow test of insanity in terms of its foundation on a test of knowledge which excludes true understanding, of wrongness which excludes the accused's appreciation of wrongness and of nature and quality which means no more than the physical nature of the act. Similarly, McNaghten requires the Irish courts to excuse some delusions but not those which would not excuse a sane man (which the accused is not).

⁸⁴⁷ ibid pp.46-49

⁸⁴⁸ F.Boland "Diminished Responsibility as a Defence in Irish Law" op cit

⁸⁴⁹ ibid

⁸⁵⁰ ibid

⁸⁵¹ [1986] I.L.R.M.244 pp.248 & 249

⁸⁵² [1960] 3 All E.R.1

In most cases of insanity, therefore, the control test is the criterion of responsibility. This leaves open the possibility of an insanity defence for the psychopath in Irish law. In Chapter Two⁸⁵³ I have discussed the preferable approach of the English courts in treating psychopathy as a species of diminished responsibility and the view of the Royal Commission on Capital Punishment (1949-53), that the responsibility of the psychopath can be regarded as diminished rather than obliterated. Given that psychiatry views psychopathy as a personality disorder rather than as a mental illness and that the Butler Committee has taken the view that it is a non-curable condition⁸⁵⁴ and therefore, that prison is a preferable receptacle to a mental hospital⁸⁵⁵, it can hardly be said that the insanity defence, whose consequence in Ireland is mandatory indefinite committal to the State Mental Hospital, is the most appropriate method of dealing with the psychopath. An acquittal for the psychopath is likely to be far more controversial than judicial recognition of reduced culpability.

Nor can it be said that psychiatrists have any special competence in answering the philosophical conundrum which is posed by the Irish insanity defence: Was the accused debarred from refraining from committing the act because of a defect of reason due to mental illness?. The very existence of the control test places defence psychiatrists under considerable pressure to tailor their evidence to it⁸⁵⁶, an objection which has been repeatedly levelled at the McNaghten Rules.

A liberal interpretation of the Irish control test, requiring merely substantial difficulty in the control of acts, may make the application of the Irish insanity defence very wide. That the Irish courts might follow the English approach and interpret "mental illness" to cover epilepsy, hyperglycaemia and sleepwalking remains a constant threat. Add to this the effect of the Court of Appeal's ruling in People (A.G.) v Messitt⁸⁵⁷, which held that where evidence of insanity is available to the prosecution

⁸⁵³ See Section 2.4 above

⁸⁵⁴ Report of the (Butler) Committee on Mentally Abnormal Offenders, Cmnd 6244 (London, 1975)

para.5.34

⁸⁵⁵ ibid para.5.38

⁸⁵⁶ F.McAuley op cit p.59

⁸⁵⁷ [1972] I.R.204

and the defence does not choose to raise the issue, the prosecution are under an obligation to do so themselves, and the true scope of Irish insanity defence becomes evident. As there has been no amending legislation to the insanity verdict akin to the English Criminal Procedure (Insanity) Act, 1964, it is likely that there is still no right of appeal from an acquittal on the ground of insanity, in the Irish courts⁸⁵⁸.

The regime of compulsory hospitalisation is equally open to objection. As McAuley points out⁸⁵⁹, given that preventive detention is such a drastic measure, trial judges should be given a discretionary power to order the immediate release of insanity acquittees, with or without conditions. The writer's view is that unnecessary hospitalisation will serve no purpose and is a waste of public resources.

The problem is exacerbated by the unsatisfactory procedure for release of those found "guilty but insane" from detention, once cured of their mental affliction. In People (D.P.P.) v Patrick Ellis⁸⁶⁰ O'Hanlon J. in the Central Criminal Court placed the burden of deciding their release on the Government, on the grounds that this was not a decision which came under the umbrella of "law and justice". Soon after in People (D.P.P.) v Neilan⁸⁶¹ Keane J. in the same court replaced this function on the Judiciary. Then the Supreme Court in D.P.P. v John Gallagher⁸⁶² ruled that release following a finding of insanity is an Executive function. What is of interest in this case is the submission to the contrary by the Attorney General, which suggests that neither the courts nor the Government wished to have this function vested in them.

The Government is not obliged to carry out a review of detention in cases where the detainee has not sought one⁸⁶³. As a result, in Ellis it was two years before a review was carried out despite abundant evidence of his sanity⁸⁶⁴.

⁸⁵⁸ In 1978 the *Henchy* Committee recommended a right of appeal from an acquittal by reason of insanity but its proposals have never been implemented.

⁸⁵⁹ F.McAuley op cit p.118

⁸⁶⁰ (1990) 2 I.R.291

⁸⁶¹ (1990) 2 I.R.267

⁸⁶² (1991) 1 I.R.31

⁸⁶³ F.McAuley op cit p.121

⁸⁶⁴ ibid

In such politically sensitive cases as these, the Government is bound to be extra sensitive to the danger of arousing public condemnation when approaching the question of release from custody. Several features of the Gallagher case have aroused the suspicion that the failure to release the detainee was motivated more by a concern to ensure that defendants of this type are seen not to be able to escape their just deserts by means of the insanity plea than by a dispassionate assessment of his state of mental health⁸⁶⁵. Firstly, an advisory committee set up by the Minister for Justice in January 1994 made recommendations, which, if implemented, might have been expected to result in Gallagher's early release⁸⁶⁶. As Barron J. noted in the High Court in December 1994, the State had by then not responded adequately to the recommendations of the committee⁸⁶⁷. Secondly, in March of this year the Inspector of Mental Hospitals (Dr.Dermot Walsh) exercised his powers under subsection 6 of the Mental Treatment Act, 1945, which allows him to carry out an inspection of the Central Mental Hospital whenever and as often as he sees fit and permits him to make a report to the Minister for Justice on the "general character and conduct" of an inmate whom he believes has recovered⁸⁶⁸. The report to the Minister which stated that John Gallagher had now "recovered" was later withdrawn⁸⁶⁹.

By the end of the 1980's it had become standard practice for the hospital authorities to seek and for the courts to recommend, the release of patients after four to five years (previously the average period of detention stood at seven years)⁸⁷⁰. This state of affairs is remarkable in view of the fact that research has shown that very few insanity acquittees are severely psychotic by the time of trial, that insanity acquittees generally do not require lengthy committals on mental health grounds and that many of them could be treated on an outpatient basis⁸⁷¹. McAuley attributes the reduced average period of detention in some part to the operation of an informal system of "sentencing" discounts on the grounds of mental disorder rather than to the existence

⁸⁶⁵ ibid p.123

⁸⁶⁶ *Irish Times*, 17 Dec.1994

⁸⁶⁷ ibid

⁸⁶⁸ *Irish Times* 26 Apr.1995

⁸⁶⁹ ibid

⁸⁷⁰ F.McAuley op cit p.127

⁸⁷¹ ibid

of a programme designed to ensure that preventive detention does not exceed the necessary therapeutic minimum⁸⁷².

In the last term of 1989 a verdict of "guilty but insane" was sought by the defence in four trials on indictment out of seven and achieved in three⁸⁷³. The increased incidence of the special verdict⁸⁷⁴ makes the need for reform of this area of the law a matter of urgency. Reform of the insanity defence was proposed in 1978 by the Interdepartmental Committee on Mentally Ill and Maladjusted Persons which reported under the chairmanship of the now Supreme Court Judge, Mr Justice Henchy. Its Third Interim Report entitled *Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Courts on Criminal Charges*, stated that because of the law on insanity as stated in Doyle "many persons are dealt with by the courts as "normal" offenders who are either not responsible (or not fully responsible) for the conduct charged against them"⁸⁷⁵. This statement, which echoes that of the Butler Committee, is a surprising allegation given the broadness of the Irish control test.

After considering the various formulae in different jurisdictions, the Committee opted for the following tripartite test of insanity, which asks:

- 1) Did the accused commit the act or omission charged?
- 2) if so, was he suffering at the time from mental disorder (as defined)? and
- 3) if so, was it such that he should not be found guilty of the offence?⁸⁷⁶

If these three conditions were satisfied the jury should return a verdict of not guilty by reason of mental disorder.

⁸⁷² ibid p.128

⁸⁷³ P.Carney "Anachronism of our Criminal Insanity Laws" *Irish Times* 13 Jan.1990

⁸⁷⁴ S.Barton "Criminal Law - Insanity in the Supreme Court" (1991) 13 D.U.L.J 127 p.134

⁸⁷⁵ Third Interim Report of the Inter-departmental Committee on Mentally Ill and Maladjusted Persons *Treatment and Care of Persons Suffering from Mental Disorder who Appear before the Courts on Criminal Charges* Prl (8275) (Dublin, 1978) p.3 para.4

⁸⁷⁶ ibid p.4 para.7

The Committee felt that their test which has not the detail or particularity of some of the other formulations, has the merit of concentrating the decision on whether, having regard to the nature and effect of the particular mental disorder, the accused should be held to be outside the range of legal responsibility.

"Mental Disorder" was defined⁸⁷⁷ as mental illness or mental handicap but as not including violent personality disorder. From this, it is tempting to infer dissatisfaction on the part of the author of the Irish control test, with the applicability of his test to the psychopath⁸⁷⁸.

The failure to attribute a legal meaning to mental illness suggests that it is a term which will be given meaning by the psychiatric profession. This division of labour between the expert witnesses and the jury is likely to prove unsatisfactory given the experience of the New Hampshire rule, the recommendation of the Royal Commission on Capital Punishment (1949-1953), and the Durham Rule, discussed in Chapter One. With no standard by which to judge the medical evidence, no measure of the necessary effect of mental illness, the burden on the jury is likely to prove too heavy and it will choose to heed the evidence of the expert with the greatest credentials or better presentation skills. If the jury performs its task conscientiously the warning of the D.C. Court of Appeals in Brawner, which rejected this approach, is worth heeding. There the court was of the view that

"an instruction overtly cast in terms of "justice" cannot feasibly be restricted to the ambit of what may properly be taken into account but will splash with unconfinable and malign consequences"⁸⁷⁹.

The court continued

"The thrust of a rule that..invites the jury..[to]..do what to them seems just, is to focus on what seems "just" as to the particular individual.

⁸⁷⁷ ibid p.15

⁸⁷⁸ F.Boland "Diminished Responsibility as a Defence in Irish Law" op cit

⁸⁷⁹ 471 F2d 969 (1974) p.987

Under the centuries-long pull of the Judeo-Christian ethic, this is likely to suggest a call for understanding and forgiveness of those who have committed crimes against society but plead the influence of passionate and perhaps justified grievances against that society, perhaps grievances not wholly lacking in merit..The judgment of a court of law must further justice to the community, and safeguard it, against undercutting and evasion from overconcern for the individual. What this reflects is not the rigidity of retributive justice..but awareness how justice in the broad may be undermined by an excess of compassion as well as passion. Justice to the community includes penalties needed to cope with disobedience by those capable of control, undergirding a social environment that broadly inhibits behavior destructive of the common good. An open society requires mutual respect and regard and mutually reinforcing relationships among its citizens, and its ideals of justice must safeguard the vast majority who responsibly shoulder the burdens implicit in its ordered liberty. Still another aspect of justice is the requirement for rules of conduct that establish reasonably generality, neutrality and constancy. This concept is neither static nor absolute, but it would be sapped by a rule that invites an ad hoc redefinition of the "just" with each new case⁸⁸⁰.

The difficulties inherent in this reformulated insanity defence are greatly alleviated, however, by the Henchy Committee's additional recommendation of a defence of diminished responsibility, thus ensuring that only the most meritorious cases would be dealt with by way of the insanity defence⁸⁸¹. Persons with a lesser degree of mental disorder would be likely to plead diminished responsibility, guaranteeing that the new insanity defence would be less controversial than if it stood alone.

⁸⁸⁰ ibid p.988

⁸⁸¹ F.Boland "Diminished Responsibility as a Defence in Irish Law" op cit

Mr McAuley believes⁸⁸² that although the Henchy Committee's report has never been enacted⁸⁸³ the product rule may actually be part of Irish Law since Coughlan, where Kennedy J. gave as his view that the appropriate test was - "*Was the act caused by disease of the mind?*". I submit that this is unlikely to be the case in view of the fact that the Supreme Court did not approve it when it had the opportunity to do so in Doyle. Also there is no reported case of a jury having been directed along the lines of the principle adumbrated in Coughlan⁸⁸⁴.

D.P.P. v Penny Ann Dorricott⁸⁸⁵, decided in the Central Criminal Court on 3/2/1982, shows that the control test is firmly entrenched in Irish law. There Finlay J. asked the jury to consider as the third proposition (the first two being the McNaghten Rules) whether the accused, at the time of the act, was suffering from a disease of the mind which prevented her from exercising a free volition. The defendant was suffering from insane delusions.

More recently, Sean Courtney was found guilty of murder after his plea of insanity, based on evidence of post-traumatic stress disorder, occasioned while serving as a soldier in the Lebanon⁸⁸⁶, was rejected by the jury. Mr Justice Lynch asked the jury "At the time when the accused..killed the deceased..was he acting under the influence of an irresistible impulse caused by a defect of reason due to mental illness which debarred him from refraining from killing her?"⁸⁸⁷. Given that the irresistible impulse test is more stringent than the control test and that irresistible impulse has no place in Irish law, the propriety of the judge's direction is open to question.

Rather than constituting an appendix to the Rules, the control test has emerged in Irish law as McNaghten's successor in all cases except delusion. In recent years the

⁸⁸² F.McAuley op cit p.13

⁸⁸³ *Pace* McAuley the Henchy test is not strictly speaking a product test but a "justly responsible" test similar to the recommendation of the Royal Commission on Capital Punishment 1949-53, subsequently adopted as the test of insanity in Rhode Island.

⁸⁸⁴ F.McAuley op cit p.14

⁸⁸⁵ *supra* f.n. 873

⁸⁸⁶ *Irish Times* 22 Jan.1993 and *Irish Times* 21 Jan.1993

⁸⁸⁷ *Irish Times* 23 Jan.1993

Supreme Court's decision in Doyle has come under attack, most notably by Irish judges. Speaking of the detention and release of those found guilty but insane in Irish law, O'Hanlon J. in Ellis commented

"..the problem has been compounded by developments in the law as to insanity as a defence to a criminal charge, which have taken place in this jurisdiction in the last quarter-century or so"⁸⁸⁸.

Despite some approbation of the Henchy Committee's attempt to reformulate the Irish insanity defence⁸⁸⁹, its recommendation on the wording of the insanity defence has been subjected to virtually no critical scrutiny. This criticism is equally open to the adoption of the control test by the Irish judges, who blindly followed the American expedient, and whose defects have only become obvious with the passage of time⁸⁹⁰. The defects inherent in the Irish control test and in the Henchy's Committee's proposed alternative underscore the futility of attempting to palliate the controversy over the McNaghten Rules by devising a reformulation of the insanity defence⁸⁹¹. I will now address the constitutional considerations involved in Ireland's insanity defence, which add yet another dimension to its unsatisfactory nature.

3.2 CONSTITUTIONAL LAW ISSUES

The extent to which indefinite detention under the Trial of Lunatics Act, 1883 and the Supreme Court decision of Doyle are inconsistent with the Irish Constitution is the subject of this section. The discussion is intended to add extra emphasis to the unsatisfactory nature of the law on insanity in Ireland.

⁸⁸⁸ (1990) 2 I.R.291 p.294

⁸⁸⁹ eg. by Deputy Pat McCartan Ir.P.Deb.,1995, Vol.405

⁸⁹⁰ F.Boland "Diminished Responsibility as a Defence in Irish Law" op cit

⁸⁹¹ ibid

3.2.1 The Trial of Lunatics Act, 1883

The starting point to any discussion of England's legislative legacy is Article 73 of the Constitution of Saorstat Eireann, which provided that pre-1922 legislation was part of Irish law only to the extent that it was in conformity with the Constitution of 1922. This principle is now enshrined in Article 50 of the Constitution of 1937.

The Trial of Lunatics Act, 1883 which governs the detention and release of insanity acquittees in Ireland does not have the benefit of the presumption of constitutionality enjoyed by post-1937 legislation. If this piece of legislation is to stand then it must conform with the provisions of the Constitution. I will now look firstly, at its conformity with the right to liberty under Article 40.4.1 and then, with the unenumerated rights derived from Articles 40.3.1 and 40.3.2.

3.2.1.1 The Right to Liberty

The right to liberty as specified in Article 40.4.1 lays down that

"No citizen shall be deprived of his personal liberty save in accordance with law".

In State (Royle) v Governor of Mountjoy Prison⁸⁹² Henchy J. offered the following vague explanation of the phrase "in accordance with law"

"The expression is a compendious one and is designed to cover these basic legal principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders a detention unjustifiable in the eyes of the law. To enumerate them in advance would not be feasible and, in any case, an attempt to do so would only tend to diminish the constitutional guarantee. The effect of that guarantee is that unless the High Court

⁸⁹² [1974] I.R.259

(or, on appeal, the Supreme Court) is satisfied that the detention in question is in accordance with the law, the detained person is entitled to an unqualified release from that detention. It is the circumstances of the particular case that will usually determine whether or not a detention is in accordance with the law"⁸⁹³.

Further guidance as to one such principle "so essential for the preservation of personal liberty..that departure..renders a detention unjustifiable in the eyes of the law" may be derived from the *obiter dictum* of Finlay C.J. in People (D.P.P.) v O'Mahony⁸⁹⁴

"Under our law a person found not guilty by reason of insanity can only be detained so long as the court is satisfied that his mental condition persists in a form and to the extent that his detention in an appropriate institution is *necessary for the protection of himself or of others*" (emphasis added).

Unfortunately Finlay C.J's optimism has not been borne out by the experience of the defendants Ellis and Gallagher. Replacing the function of deciding release on the Judiciary in People (D.P.P.) v Neilan, Keane J. offered further guidance on the principles that must be adhered to in the name of safeguarding the liberty of the individual⁸⁹⁵

"[The 1883 Act] does not carry with it, of course, the presumption of constitutionality, but if in truth it remains part of our law it can only be because of its conformity with the Constitution. If it is so consistent, then it must be capable of being construed so as to require that *the executive will not detain a person in the position of the defendant in an arbitrary, capricious or unreasonable manner*"(emphasis added).

⁸⁹³ ibid p.269

⁸⁹⁴ [1986] I.L.R.M.244 p.249

⁸⁹⁵ (1990) 2 I.R.267 p.284

He continued

"The person whose liberty is now in issue is a citizen innocent of any crime. If his continued detention is no longer required by considerations of the public welfare or of his own safety, he is entitled to be set free, not as a matter of privilege or concession, but because his being set at liberty is necessary to protect and vindicate his right to liberty under the Constitution"⁸⁹⁶.

Keane J. found that the further detention of the defendant would not be justified in law, on the grounds that he had made a complete recovery and was no longer a danger to the public or to himself. He then proceeded to strike down section 2(2) of the 1883 Act, which vests release in the Lord Lieutenant (whose functions are now exercised by the Minister for Justice), as being inconsistent with the provisions of the Constitution and with the exclusive exercise by the courts of a judicial function. Unfortunately, he did not specify that the 1883 Act might be in violation of the right to liberty. Accordingly, this is not an issue which was taken up by the Supreme Court in Gallagher when it held that it is for the Minister for Justice to decide if and when a detained person should be released, as part of "the executive's role in caring for society and the protection of the common good"⁸⁹⁷. The Supreme Court held that in so deciding, the Minister must use fair and constitutional procedures and they then took consolation from the fact that the Minister's decision may be the subject of judicial review so as to ensure compliance with such procedures.

In this manner the Supreme Court has pledged itself to safeguarding the right to liberty of the insanity acquitted. However, if legally uninformed the acquitted will be unaware of the possibility of judicial review and like Ellis and possibly Gallagher may be confined for longer than is required in the interests of public or his own safety. Following an order by O'Hanlon J. in November 1994 that Gallagher be produced before the High Court and that the grounds of his detention be clarified⁸⁹⁸, Barron J.

⁸⁹⁶ ibid p.287

⁸⁹⁷ (1991) 1 I.R.31 p.37

⁸⁹⁸ *Irish Times* 30 Nov.1994

merely reiterated that it is for the Government to decide if Gallagher should be released⁸⁹⁹. Hence the decision in Gallagher provides a less than adequate safeguard and the 1883 Act remains in breach of the constitutional right to liberty of the insanity acquittee⁹⁰⁰.

3.2.1.2 Unenumerated Rights

In Articles 40.3.1 and 40.3.2 further guarantees are made to protect the personal rights of citizens. Subsection 1 provides

"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen"

while subsection 2 states that

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen"

Whether or not these provisions contain a constitutional guarantee against cruel and unusual punishment (as found in the eighth amendment of the United States Constitution) which might invalidate the 1883 Act, will now be addressed.

In Ryan v A.G.⁹⁰¹ O'Dalaigh in the Supreme Court agreed with Kenny J. that the personal rights mentioned in Article 40.3.1 are not exhausted by the enumeration of "life, person, good name and property rights", as is shown by the use of the words "in particular" in Article 40.3.2, nor by the more detached treatment of specific rights in the subsequent sections of the article. In particular, there existed a right to bodily integrity. The Supreme Court declined to attempt to make a list of all the rights which

⁸⁹⁹ *Irish Times* 17 Dec.1994

⁹⁰⁰ F.Boland "Insanity, the Constitution, and the European Convention on Human Rights" *forthcoming* (1996) 47 N.I.L.Q.

⁹⁰¹ [1965] I.R.294

may properly fall within the category of "personal rights" because of the difficult and unnecessary nature of the task in the instant case.

Further unspecified rights which have been held to exist under Articles 40.3.1 and 40.3.2⁹⁰² are

1. The right to dispose of and withdraw one's labour and the right not to belong to a trade union⁹⁰³.
2. The right to earn one's livelihood⁹⁰⁴.
3. The right to work⁹⁰⁵.
4. The right to litigate claims⁹⁰⁶.
5. The right to prepare for and follow a chosen career⁹⁰⁷.
6. The right to consult and be represented by a lawyer when charged with a serious criminal offence⁹⁰⁸.
7. The right to be assisted by the State if one's health is in jeopardy⁹⁰⁹.
8. The right to marry⁹¹⁰.
9. The right to free movement within the State⁹¹¹.
10. The right to medical aid or assistance⁹¹².
11. The right to travel outside the State⁹¹³
12. The right of a mother to the custody and control of the upbringing of her child (a right not enjoyed by the mother of an illegitimate child).⁹¹⁴
13. The right of a child to be reared with due regard to its welfare, religious and moral, intellectual, physical and social.⁹¹⁵

⁹⁰² The first nine rights are dealt with in the same manner as R.F.V.Heuston "Personal Rights Under the Irish Constitution" (1976) 11 Ir.Jur.205 p.220

⁹⁰³ *Educational Co. of Ireland v Fitzpatrick* [1961] I.R.345

⁹⁰⁴ *Murtagh Properties Ltd. v Cleary* [1972] I.R.330 p.336

⁹⁰⁵ *Murphy v Stewart* [1973] I.R.97

⁹⁰⁶ *Macaulay v Minister for Posts and Telegraphs* [1966] I.R.345; *Murtagh Properties Ltd v Cleary* [1972] I.R.330

⁹⁰⁷ *Landers v A.G.* (1975) 109 I.L.T.R.1

⁹⁰⁸ *The State (Healy) v Donoghue* [1976] I.R.325

⁹⁰⁹ Walsh J. in *McGee v A.G.* [1974] I.R.284 p.315

⁹¹⁰ *Ryan v A.G.* [1965] I.R.294 p.313

⁹¹¹ *ibid*

⁹¹² *The State (C) v Frawley* Apr.1976

⁹¹³ *The State (K.M. and R.D) v Minister for Foreign Affairs* [1979] I.R.73

⁹¹⁴ *G v An Bord Uchtala* [1980] I.R.32

14. The right to life⁹¹⁶.
15. The right to a minimum standard of basic material conditions to foster and protect one's dignity and freedom as a human person⁹¹⁷.
16. The right to procreate children within marriage⁹¹⁸.
17. The right to fairness of procedures, incorporating the right of fair trial by a jury unprejudiced by pre-trial publicity⁹¹⁹.

In creating personal rights under Articles 40.3.1 and 40.3.2 the courts have resorted to three tests⁹²⁰ - firstly, rights derived from the Christian and democratic nature of the State⁹²¹ secondly, rights derived from natural law⁹²² and thirdly, rights that "inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution"⁹²³.

All of these tests can be invoked in favour of a constitutional guarantee against cruel and unusual punishment which, if recognised, would render unconstitutional the indefinite committal of insanity acquittees, terminable only at the caprice of a Government Minister. It should be remembered that those incarcerated under section 2(2) of the Trial of Lunatics Act have been acquitted by reason of insanity of any criminal offence.

This spate of discovering rights, which reached its zenith in the 1970's, has abated somewhat. Nonetheless, rights continue to be identified from time to time⁹²⁴. As one commentator has remarked

⁹¹⁵ *ibid*

⁹¹⁶ *A.G. (S.P.U.C.) v Open Door Counselling Ltd. and the Dublin Well-Woman Centre* [1988] I.R.593

⁹¹⁷ *O'Reilly v Limerick Corporation* [1989] I.L.R.M.

⁹¹⁸ *Murray v Ireland* [1991] I.L.R.M.465

⁹¹⁹ *D v D.P.P.* 1993 Transcript No.76, 17 Nov.1993

⁹²⁰ For further commentary on the three tests see G.W. Hogan "Unenumerated Personal Rights: *Ryan's Case Re-evaluated*" (1990-2) Ir.Jur.95 pp.104-111

⁹²¹ *Ryan v A.G.* [1965] I.R.294

⁹²² *McGee v A.G.* [1974] I.R.284

⁹²³ *Norris v A.G* [1984] I.R.36

⁹²⁴ B.Chubb *The Politics of the Irish Constitution* (Dublin, 1991) p.68

"The experience of both [United States and Irish] Courts suggests that, whatever the doctrinal formulation, rights regarded as sufficiently basic and important will be found to merit judicial recognition and protection"⁹²⁵.

As the Irish courts have frequently reached the same conclusions as the American courts on the same questions⁹²⁶, it is likely that they would do so again, if called upon to create a guarantee against cruel and unusual punishment⁹²⁷.

The Trial of Lunatics Act, 1883 was enacted during a period when locking the insane up and throwing away the key was by common consent ignored. Our evolution from a society which dealt with all social outcasts by hiding them away from view⁹²⁸ to a more caring community, less preoccupied with social stigma, has only happened in recent years. The State (Healy) v Donoghue⁹²⁹ makes clear that the Constitution can be adapted to meet this social change and provides support for a guarantee against the cruel and unusual punishment of indefinite incarceration:

"The preamble to the Constitution records that the people "seeking to promote the common good, with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, do hereby adopt, enact and give to ourselves this Constitution." In my view, this preamble makes it clear that rights given by the Constitution must be considered in accordance with concepts of prudence, justice and charity which may gradually change or develop as society changes and develops, and which fall to be interpreted from time to time in accordance with prevailing ideas. The preamble envisages a Constitution which can

⁹²⁵ F.X.Beytagh "Individual Rights, Judicial Review and Written Constitutions" in *Human Rights and Constitutional Law* (Dublin, 1992) p.154

⁹²⁶ ibid p.157

⁹²⁷ F.Boland "Insanity, the Constitution and the European Convention on Human Rights" op cit

⁹²⁸ See N.Browne *Against the Tide* (Dublin, 1986) pp.242-246

⁹²⁹ Supra f.n. 908

absorb or be adapted to such changes. In other words, the Constitution did not seek to impose for all time the ideas prevalent or accepted with regard to these virtues at the time of its enactment"⁹³⁰.

This view had earlier been taken by Walsh J. in McGee v A.G., when he said that "no interpretation of the Constitution is intended to be final for all time"⁹³¹.

The common view is that the constitution must be adapted to changing circumstances if it is to retain its normative character. One commentator has stated

"In practice in any country at any time the constitution will have this valuable normative character to the extent to which it embodies and reflects the traditions, culture and standards of the people of that country"⁹³².

If the Irish Constitution is to command this respect, it will have to adapt to the more enlightened attitude of the Irish to the mentally ill today. A guarantee against cruel and unusual punishment would reflect this recently dawning enlightenment.

3.2.2 Doyle v Wicklow Co.Council

In this section I will focus on the extent to which the Supreme Court's decision in Doyle is in conformity with the Constitution, in particular, with the separation of powers guarantee in Article 6.1, and Article 15.2.1 which states

The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State

By the 1950's with the emergence of Irish nationalism as a legal ideology, discussed *above*, it was becoming clear that the Irish Constitution was to take

⁹³⁰ ibid p.347

⁹³¹ [1974] I.R.284 p.319

⁹³² B.Chubb op cit p.6

precedence over common law principles. The first to expound this view was Gavin Duffy J. in Re Tilson Infants⁹³³. On appeal, Murnaghan J. in the Supreme Court endorsed this view with the words

"The Constitution states fundamental principles, and, however these principles may have been reached, when they are enshrined in the Constitution they become, and are, the fundamental law of the State. Previously existing law and principles are of no force in the State unless they derive efficacy from article 50 of the Constitution..The archaic law of England rapidly disintegrating under modern conditions need not be a guide for the fundamental principles of a modern state. It is not a proper method of construing a new constitution of a modern state to make an approach in the light of legal survivals of an earlier law"⁹³⁴.

Then in State (Browne) v Feran⁹³⁵ Walsh J., repudiating the old common law rule against appeal by the prosecution from a successful *habeas corpus* application, pronounced unequivocally that "[t]he Constitution is the basic and fundamental law of the State and must be construed as such"⁹³⁶. The decision in Browne led to a willingness to subject common law principles to constitutional scrutiny and signalled a profound break with the pre-existing common law way of thinking⁹³⁷. The flourishing of judicial review during and since this decade was not inhibited by concerns about whether the exercise of this power was a great usurpation of the Legislature's function by the Judiciary⁹³⁸. As a result the courts began to be seen as the place to which those with a grievance or a cause could resort when the politicians would not act⁹³⁹. For a decade or so from the middle sixties it fell to the courts to introduce up-dating reforms in the highly visible area of civil liberties and the judges

⁹³³ [1951] I.R.1

⁹³⁴ ibid pp.31 & 32

⁹³⁵ [1967] I.R.147

⁹³⁶ ibid p.159

⁹³⁷ G.W. Hogan "The Early Judgments of Mr Justice Brian Walsh" in *Human Rights and Constitutional Law* (Dublin, 1992) p.44

⁹³⁸ F.X.Beytagh op cit p.158

⁹³⁹ B. Chubb op cit p.73

were praised for having the courage to do what the politicians were failing to do or could be prevented by pressure from doing⁹⁴⁰. The situation developed whereby many politicians, particularly the conservatives in the rank and file of the parliamentary parties, felt that changes requiring legislation, constitutional *and other*, which would be politically hazardous were best left to the increasingly active and innovative courts⁹⁴¹. As Denis Coughlan, the political correspondent of the Irish Times, noted

"The role of the Supreme Court as the guardian of the Constitution..massaged the political cowardice of politicians in the past and encouraged them to avoid their legislative responsibility.

The comfortable conviction grew up that legislation on difficult and dangerous social issues could await the imprimatur of the Supreme Court and that direct Constitutional reform should be avoided⁹⁴²."

Patrick MacEntee, Chairman of the Bar Council and advocate for the defendant in People (D.P.P.) v O'Mahony, where it was argued before the Supreme Court that diminished responsibility was part of Irish law, commented shortly afterwards

"I conclude that the legislature has been disposed to vacate certain areas of their legislative functions where unpopular decisions were for one reason or another unavoidable"⁹⁴³.

MacEntee pointed out that in two recent cases the Supreme Court "had been led into areas of policy-making and legislation" for it had by these decisions "substantially amended the Extradition Act of 1965"⁹⁴⁴. He continued

⁹⁴⁰ ibid

⁹⁴¹ B.Chubb op cit p.123

⁹⁴² *The Irish Times* 29 Dec.1987

⁹⁴³ *Irish Times* 18 Aug.1986

⁹⁴⁴ ibid

"not alone did the court substantially change the law without reference to the Oireachtas, but neither House complained - on the contrary everyone seemed pleased that the Supreme Court had grasped the nettle and obviated the need for debate or decisions in Oireachtas na hEireann."

Despite the enormous potential and impetus for constitutional challenge, neither Doyle nor the 1883 Act has been subjected to judicial review. This should be viewed in light of the scarcity of constitutional pronouncements (until recent years) on criminal law issues (compared, for example, with an abundance of such pronouncements on the law of evidence). Whether this is due to the failure on the part of advocates to raise constitutional law issues in criminal law cases or to a reticence on the part of the Irish Judiciary to entertain them, is uncertain. Nonetheless the potential is there and all that remains is for someone to take up the challenge. However the Supreme Court has not always been deterred by the lack of constitutional challenge in the arena of criminal law and in the absence of legislative reform it has substantially altered the common law defences of self-defence⁹⁴⁵ and insanity⁹⁴⁶.

No doubt it was the Legislature's inertia which prompted the Supreme Court in Doyle to legislate judicially for a control test. Whilst we may sympathise with the Judiciary who were compelled to apply the unsatisfactory and anachronistic test of insanity embodied in the Rules, the propriety of this move is questionable as being in breach of the separation of powers guarantee enshrined in Article 6 of the Constitution. Aware of the impropriety of judicial legislation on the insanity defence, Kennedy C.J. in A.G. v O'Brien commented that change in the law could only come from the "Legislature competent to alter or adapt it in the light of the latest science and of the conditions of the time in which we live"⁹⁴⁷.

⁹⁴⁵ *People (Attorney General) v Christopher Dwyer* [1972] I.R.416

⁹⁴⁶ *Doyle v Wicklow Co.Council* [1974] I.R.55

⁹⁴⁷ [1936] I.R.263 p.271

The implications of the Supreme Court's criminal law decisions are far reaching. Unlike the elected parliamentarians the Judiciary is not publicly accountable. The practical effect of limiting removal from office to the grounds of "stated misbehaviour or incapacity" is that there is no sanction for an erring judge⁹⁴⁸ and the only constraints on the Irish Judiciary are those which they impose on themselves. It is also well known that the members of the Supreme Court have, in the past, been chosen from supporters of the governing political party⁹⁴⁹. Hence "the taint of suspicion"⁹⁵⁰ of Government influence and of the use of the Supreme Court to effect controversial changes when the Government has wished to retain public confidence. It is difficult to avoid a conclusion along these lines in light of the satisfaction of both Houses of Parliament with the Supreme Court's action on issues like the Extradition Act.

In Maher v A.G.⁹⁵¹ the court stated that the usurpation by the Judiciary of an exclusively legislative function is no less unconstitutional than the usurpation by the Legislature of an exclusively judicial function and that "[t]he right to choose and formulate legislative policy is vested exclusively by the Constitution in the national parliament"⁹⁵². Clearly there are some judges who have been vigilant in their respect of Article 15.2.1. Thus O'Hanlon J. in Ellis has commented

"With hindsight, having regard to the problems arising in the present case and in other similar cases, one might conclude that any departure from the strict requirements of the McNaughton Rules would be better affected by legislation, as happened in England with the passing of the Homicide Act, 1957"⁹⁵³.

⁹⁴⁸ D.G.Morgan *Irish Times* 2 Mar.1995

⁹⁴⁹ D.G.Morgan *Irish Times* 19 Sept.1994

⁹⁵⁰ Jim Mitchell T.D, Chairman of the Dail Public Accounts Committee, quoted by the *Irish Times* 11 Mar.1994

⁹⁵¹ [1973] I.R.140

⁹⁵² *ibid* p.148

⁹⁵³ [1990] 2 I.R.291 p.295

Although O'Hanlon appears to be approving the English solution to the McNaghten dilemma, this statement carries an implicit reservation about the propriety of the Supreme Court's manoeuvre in Doyle. No doubt with this in mind the Supreme Court in The People (D.P.P.) v O'Mahony declined to accept the English defence of diminished responsibility as part of Irish law, saying that the Homicide Act, 1957 was an attempt by the Legislature to liberalise or ameliorate the McNaghten Rules in England and was not merely declaratory of a common law principle. Doyle has not been subjected to judicial review but if it were it is doubtful that the decision could withstand the challenge to its constitutionality.

The constitutional validity of both the 1883 Act and the decision in Doyle is therefore questionable, the former for being in breach of the right to liberty and a possible guarantee against cruel and unusual punishment; the latter for infringing on the law-making jurisdiction of the Legislature. As yet, however, no one has taken up the challenge posed by their questionable constitutionality. The European Convention on Human Rights provides a further guarantee against infringement of liberty against which I will now test the control test and the 1883 Act.

3.3 INSANITY AND THE EUROPEAN COURT OF HUMAN RIGHTS

The Irish insanity defence and the mandatory committal of acquittees may also be in breach of the European Convention on Human Rights⁹⁵⁴. In this section I will examine the compatibility of compulsory hospitalisation with Article 5(1)(e) of the European Convention. I will also examine the compatibility the Minister's discretionary powers of release with Article 5(4) of the Convention.

Article 5(1) provides

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

⁹⁵⁴ F.Boland "Insanity, the Constitution and the European Convention on Human Rights" op cit

..(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants..

As regards the requirement of "lawfulness" in (e), the European Court of Human Rights in Winterwerp v the Netherlands⁹⁵⁵ has said that this means that "no one may be confined as 'a person of unsound mind' in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation"⁹⁵⁶, and that "the mental disorder must be of a kind or degree warranting compulsory confinement"⁹⁵⁷.

The decision in Ellis which reveals the consensus of the psychiatrists at the State Mental Hospital that the defendant had been sane since the first moment that he came into their care, shows that the ambit of the Irish insanity defence may lead to a finding of insanity and mandatory committal in the case of defendants whose mental state may not warrant compulsory hospitalisation.

The procedure governing release of insanity acquittees may also be in breach of the European Convention on Human Rights, Article 5(4) of which provides that

Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful

In X v United Kingdom⁹⁵⁸ the European Court of Human Rights held that the most important characteristic of a court under Article 5(4) is "independence of the executive and of the parties to the case"⁹⁵⁹. For this reason they found the vesting in the Home Secretary of the discretion to order release from hospital, by the Mental Health Act, 1959, to be in breach of Article 5(4).

⁹⁵⁵ (1979) 2 E.H.R.R.387

⁹⁵⁶ ibid para.39

⁹⁵⁷ ibid

⁹⁵⁸ 4 E.H.R.R.188

⁹⁵⁹ ibid para.53

The decision in X v United Kingdom raises the obvious question of whether the Supreme Court's decision in Gallagher to replace this function on the Minister for Justice is in breach of the European Convention on Human Rights.

The European Court of Human Rights noted that "the remedy of habeas corpus can on occasions constitute an effective check against arbitrariness..and may be regarded as adequate, for the purposes of Article 5(4) for emergency measures"⁹⁶⁰. However in this case they felt the English *habeas corpus* procedure to be insufficiently wide. The English procedure required a determination that the decision of the executive was not made in bad faith or capriciously or for a wrongful purpose and that it was supported by sufficient evidence and was not one which no reasonable person could have reached in the circumstances. The Court stipulated that Article 5(4) requires a judicial procedure which has the remit to examine whether the Home Secretary is entitled, on the evidence available to him, to form a judgment that the mental disorder persists and that a continuation of compulsory confinement is necessary in the interests of public safety.

From X v U.K. it emerges that, in order to comply with Article 5(4), the Irish *habeas corpus* procedure will have to involve much more than a determination of whether the Minister for Justice has exceeded her powers: the Irish courts will have to be empowered to determine whether any fundamental rights under the Convention have been infringed and will have to be permitted to substitute their own decision for the Minister's in appropriate cases. However it is tempting to infer a lack of the required independence from the deference shown by Barron J. to the Government's discretion when Gallagher was brought before the High Court in December 1994⁹⁶¹.

The decision of the European Court of Human Rights in Winterwerp that Article 5(4) does not require that persons committed should themselves take the initiative in obtaining legal representation before having recourse to a court⁹⁶²,

⁹⁶⁰ *ibid* para.58

⁹⁶¹ *Irish Times* 17 Dec.1994

⁹⁶² (1979) 2 E.H.R.R.387 para.66

suggests that the right of recourse to a court should not be dependent upon the patient's taking the initiative to apply⁹⁶³ and that periodic review of detention is required under Article 5(4). As McAuley points out⁹⁶⁴ the Irish Government is not obliged to carry out a review where the detainee has not sought one. Thus in Ellis it was two years before a review was carried out at the defendant's request notwithstanding the abundance of medical evidence of his sanity⁹⁶⁵.

The likelihood, therefore, is that both the Supreme Court decision of Gallagher and Ellis and the Trial of Lunatics Act, 1883 are in breach of the Convention in several respects and it may well be that a decision of the European Court of Human Rights will be the last straw which prompts the long-awaited legislative action on the law of insanity⁹⁶⁶.

3.4 DIMINISHED RESPONSIBILITY AS A DEFENCE IN IRISH LAW

Aware of the impossibility of satisfactorily reformulating the insanity defence, a defence of diminished responsibility has from time to time commended itself to Irish lawyers, judges and academic commentators. Support for a diminished responsibility defence in Irish law has been slowly gathering momentum since the late 1970's. In this section I will trace the origins of this movement in the early years of the Irish Free State and its curtailment during the 1950's by the American influence, stemming from the emergence of nationalism as an ideology among the Judiciary. I will proceed to examine the more recent resurgence of opinion favourable to an Irish defence of diminished responsibility and will attempt to rationalise why neither Judiciary nor Legislature has acted to implement the defence of diminished responsibility in Irish law despite a climate which is more than favourable to its introduction.

⁹⁶³ L.Gostin "Human Rights, Judicial Review and the Mentally Disordered Offender" [1982] Crim.L.R.779 p.792

⁹⁶⁴ F.McAuley op cit p.121

⁹⁶⁵ ibid

⁹⁶⁶ F.Boland "Insanity, the Constitution and the European Convention on Human Rights" op cit

The first case in which a reduced sentence on the grounds of a lesser degree of insanity than McNaghten madness arose for judicial determination was A.G. v O'Shea⁹⁶⁷. The accused was tried for murdering a dairy maid whose body had been found six days after her disappearance, practically nude from the waist down, concealed in a clump of furze. The medical evidence disclosed a wound on the head which probably caused death and that the deceased had been violated immediately before and immediately after death. The defendant abstained at the trial from making a case of insanity.

The accused was found guilty of murder but the jury added a rider to their verdict of guilt namely "unpremeditated crime committed during a period of mental abnormality and recommend that special consideration be given to this factor."

The trial judge refused a certificate that the case was a fit one for appeal and the accused applied to the Court of Criminal Appeal for leave to appeal on the grounds of misdirection. The grounds of the application were, *inter alia*, that the trial judge should not have accepted from the jury as their verdict, the verdict which they handed in; that the said verdict was not a verdict of guilty of murder but a verdict of "Not guilty of murder" and that the judgment and sentence pronounced were not in accordance with law.

The judgment of the Court of Appeal was delivered by Kennedy C.J. who held that the verdict was complete in itself and separate from the rider and that the rider in the present case did not contain anything which constituted a qualification of the crime of murder or which would reduce it to manslaughter. With regard to the statement in the rider that the crime was committed "during a period of mental abnormality" the court was equally clear that no modification of the verdict of guilty of murder was to be found there. Abnormality was not in law insanity, which would relieve the individual of the consequences of his crime.

⁹⁶⁷ [1931] I.R.728

As in England at this time, Irish women who murdered their children were always spared from the death penalty by its commutation⁹⁶⁸. The Infanticide Act, 1949 brought the law into line with the practice in these cases. The English Infanticide Act, 1938 is the model for the Irish legislation⁹⁶⁹, section 1 of which provides

- (1) On the preliminary investigation by the District Court of a charge against a woman for the murder of her child, being a child under the age of twelve months, the Justice may if he thinks proper, alter the charge to one of infanticide and send her forward for trial on that charge.
- (2) Where upon the trial of a woman for the murder of her child, being a child under the age of twelve months, the jury are satisfied that she is guilty of infanticide, they shall return a verdict of infanticide.
- (3) A woman shall be guilty of felony named infanticide if -
 - (a) by any wilful act or omission she causes the death of her child being a child under the age of twelve months,
 - (b) the circumstances are such that but for this section the act or omission would have amounted to murder
 - (c) at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child -

and may for that offence be tried and punished as for manslaughter.

Unlike the English defence of infanticide, in Ireland infanticide may be charged from the outset and must be considered by the jury where it has been raised as an issue, with the burden on the prosecution to disprove beyond reasonable doubt the evidence which supports it⁹⁷⁰. Unlike the Irish defence of infanticide, its English counterpart was the creation of the Judiciary. However both may be regarded as a

⁹⁶⁸ P.Charleton *Offences Against the Person* (Dublin,1992) p.189

⁹⁶⁹ ibid

⁹⁷⁰ ibid p.190

concession to the Scottish practice of reducing murder to manslaughter on evidence of mental unsoundness and the effect of the Infanticide Act, 1949 is that the adoption of a full diminished responsibility defence in Ireland is just a short step away.

In 1955 The People (A.G.) v Micheal Manning⁹⁷¹ showed that the time was not ripe for the adoption of a full defence of diminished responsibility when the trial judge reasserted, although *obiter*, as the issue was not expressly raised by the defence, that abnormality is not a defence.

For several years the issue of diminished responsibility in Irish law lay dormant. This may be attributed to the influence which the American courts were exerting on Irish law from the late 1950's onwards. No doubt Irish lawyers were more impressed by the American attempts to reformulate the insanity defence than by developments in English law. This is evident in the case of McGlynn⁹⁷² where, although diminished responsibility was raised by the defence, the trial judge did not refer this issue to the Supreme Court, preferring instead to concentrate on the proposed reformulation of the insanity defence along the lines of that contained in the American Model Penal Code.

Developments in the law on insanity from this time onwards mirrored those in the United States with a product test laid down in Coughlan and a control test emerging from Hayes. I have discussed *above* the emergence of nationalism as an ideology among the Irish Judiciary⁹⁷³ and their desire to release the Irish legal system from the state of almost servile dependency on English judicial developments into which it had lapsed since independence⁹⁷⁴. Recent years, however, have seen a halt to this trend and as one commentator has noted

"geography and history will continue to ensure that the British connection will always be an important factor in Irish life. The British

⁹⁷¹ Supra f.n.810

⁹⁷² Supra f.n.823

⁹⁷³ See generally G.W.Hogan "Irish Nationalism as a Legal Ideology" op cit

⁹⁷⁴ ibid p.532

and the Irish are more closely connected with each other than either is to any other group"⁹⁷⁵.

By 1978 when it had become obvious that the Irish insanity defence was unsatisfactory, the Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons looked to English law and proposed the introduction of the defence of diminished responsibility into the Irish legal system⁹⁷⁶. The Committee limited its proposal to offences carrying fixed mandatory sentences, noting that where there is discretion as to sentence the judge is usually able to give effect in one way or another to different degrees of guilt produced by factors such as diminished responsibility⁹⁷⁷.

In the case of capital murder and murder it was proposed that the jury could find an accused guilty of manslaughter on the ground of diminished responsibility if the accused satisfied them that, at the time of the alleged offence, he was suffering from *mental disorder which, while not such as to justify a finding of not guilty by reason of mental disorder, was such as to diminish substantially his responsibility for the act or omission charged*⁹⁷⁸. The Committee recommended that such persons be punished as for manslaughter (i.e. a maximum sentence of penal servitude for life), or be committed to a designated centre until further order, or be ordered to be released subject to such conditions as the judge may impose⁹⁷⁹.

As regards treason, the Committee recommended that where the accused was suffering at the time from diminished responsibility, he would be found guilty of treason reduced by diminished responsibility and dealt with as if he had been found guilty of manslaughter on the ground of diminished responsibility⁹⁸⁰.

⁹⁷⁵ B.Chubb op cit p.10

⁹⁷⁶ *Treatment and Care of Persons Suffering from Mental Disorder who Appear Before the Courts on Criminal Charges* op cit p.5 para.9

⁹⁷⁷ ibid

⁹⁷⁸ ibid

⁹⁷⁹ ibid

⁹⁸⁰ ibid

The Committee followed its recommendations with a draft bill but no such legislation was enacted. As with many other areas of possibly controversial social reform (discussed above) it is likely that the Legislature was leaving the introduction of diminished responsibility to the increasingly innovative and active Judiciary⁹⁸¹ who had recently altered the insanity defence in **Hayes** and might do so again. However it was some years before a defence of diminished responsibility was argued before the Irish Supreme Court.

The Supreme Court's opportunity came with **the People (D.P.P.) v Joseph O'Mahony**⁹⁸² which was an attempt to introduce the defence of diminished responsibility into Irish Law *via* the courts. The accused was charged with murder (strangulation committed in the course of a burglary) in the Central Criminal Court. The medical evidence tendered was to the effect that the accused was a borderline mental defective or borderline below average intelligence individual and by reason of his history (orphaned from an early age) and upbringing (limited attendance at school) when involved in a violent situation he suffered from a condition of psychotic intensity which prevented him from stopping or withdrawing from violent acts.

Counsel for the accused stated that he had specific instructions not to raise the issue of insanity and the trial judge, Costello J., decided he should not leave the issue to the jury. Instead he left to the jury the issue as to whether they were satisfied beyond a reasonable doubt, having regard to medical and other evidence, that the accused was capable of forming the intent to kill or cause grievous bodily harm, and directed them that if they were not so satisfied, their verdict should be not guilty of murder but guilty of manslaughter. Counsel for the accused urged the trial judge to permit the jury to consider a defence of diminished responsibility along the lines of the following formula:-

"Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was

⁹⁸¹ B.Chubb op cit p.123

⁹⁸² [1986] I.L.R.M.244

suffering from a form of mental disorder, consisting of mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter".

The accused was convicted of murder and appealed to the Supreme Court on the ground that the trial judge erred in law in refusing to permit the jury to consider a defence of diminished responsibility.

The Supreme Court held, dismissing the appeal, that the passing of the English Homicide Act, 1957 was an attempt by the English Legislature to liberalise or ameliorate the very rigid definition of insanity, applicable in the law of England, which involved following the McNaghten Rules without expansion or extension and it was, therefore, not merely declaratory of a common law principle. The Supreme Court noted defence counsel's failure to refer the court to any decision of any criminal court, whether in England prior to the 1957 Act or in Ireland at any time, in which a defence of diminished responsibility had been allowed to go to a jury.

The court ruled that if it were established, as a matter of probability, that due to an abnormality of mind consisting of a psychotic condition, the appellant had been unable to control himself and to desist from carrying out the acts of violence leading to the death of the deceased, he would also have been entitled to a special verdict, as would the appellant in R v Byrne who suffered from perverted violent desires which he found it difficult or impossible to control. The Supreme Court felt that, there could not exist side by side with what was now the law on insanity in Ireland, a defence of diminished responsibility which would, in effect, leave an accused and his advisers the choice whether to seek to have him branded as a criminal or whether to seek on the same facts, the more humane and in a sense lenient decision that he was not guilty by reason of insanity.

The Supreme Court did not explain why a diminished responsibility defence could not co-exist with the insanity defence although possibly it felt that since the insanity defence was wide enough to encompass those who fall within the diminished responsibility defence in English law, diminished responsibility was not needed in Ireland. It failed to note, however, that in English law mentally ill offenders now often have the choice of pleading insanity *or* diminished responsibility due to the widened meaning of "disease of the mind" within the McNaghten Rules. An alternative interpretation is that the Supreme Court's reasoning was an implicit expression of dissatisfaction with the control test and a call for a legislative overhaul of the entire law of insanity.

The Supreme Court's unwillingness to legislate judicially for a diminished responsibility defence is interesting in light of the control test, judicially legislated for in Doyle. The Scottish defence of diminished responsibility is also particularly instructive as "a classic example of judge-made law"⁹⁸³. One possibility is that a differently constituted Supreme Court, aware of former mistakes, was unwilling to make itself a target for recriminations if its manoeuvre subsequently turned out to be unsatisfactory. It is also possible that a differently constituted Supreme Court was simply vigilant in respecting the separation of powers guarantee in the Irish Constitution.

The increased support for a diminished responsibility defence amongst the Judiciary has been coupled with pleas to the Oireachtas to introduce the defence. O'Hanlon J. in Ellis has commented

"With hindsight, having regard to the problems arising in the present case and in other similar cases, one might conclude that any departure from the strict requirements of the McNaughton Rules would be better effected by legislation, as happened in England with the passing of the Homicide Act, 1957..I consider that the present application, which has

⁹⁸³ J.L.Edwards "Diminished Responsibility: A Withering Away of the Concept of Criminal Responsibility" in G.O.Mueller *Essays in Criminal Science* (London, 1961) p.302

produced psychiatric evidence to the effect that the applicant is not now, and never was at any time since he was first ordered to be kept in custody as a criminal lunatic, suffering from any disease of the mind, highlights the necessity for the Oireachtas to examine as a matter of real urgency whether legislation is now needed to define the nature and scope of the plea of insanity and, possibly, of diminished responsibility, as a defence in criminal trials"⁹⁸⁴.

It appears therefore, that legislation is the only remaining avenue by way of which diminished responsibility may be introduced into Irish law.

For four years successive Irish governments have been pledging their commitment to amend the law on insanity and to introduce diminished responsibility. In a debate in Dail Eireann prompted by the Supreme Court judgment in Gallagher, Deputy Pat McCartan, referring to the Henchy Committee report, commented "It is a remarkable condemnation of this House that that report has sat on the shelves for so long and that the legal quagmire that the Government now find themselves in has been allowed to generate when solutions were there"⁹⁸⁵.

Mr.N.Treacy, Minister of State at the Department of Justice, responded by assuring Dail Eireann⁹⁸⁶ that legislation to amend the law relating to criminal insanity was at "an advanced stage of preparation". Mr.Treacy assured the House that certain issues were being examined by the Fine Fail/Progressive Democrats Government in the context of the legislation, which included the definition of criminal insanity and the possibility of introducing the concept of "guilty but with diminished responsibility". No such legislation followed.

In December 1992 the Labour and Democratic Left parties included reform of the law on insanity in their policy programme⁹⁸⁷ but in June 1994, a Progressive

⁹⁸⁴ [1990] 2 I.R.291 p.295

⁹⁸⁵ Ir.P.Deb.,1991, Vol.405 p.286

⁹⁸⁶ ibid p.287

⁹⁸⁷ *Irish Times* 10 Dec.1992

Democrats bill to change the criminal law on insanity was opposed by the Fine Fail/Labour Government. The Minister for Justice, Mrs Geoghegan Quinn, said that she would bring forward a Government bill to deal with insanity, diminished responsibility, procedures for releasing persons found insane and appeals against determination of insanity⁹⁸⁸. Although this legislation was part of the autumn legislative programme for 1994⁹⁸⁹, Fine Fail and Labour have failed to honour their commitment.

Recently, the new Fine Gael/Labour/Democratic Left Government has echoed earlier statements about legislating in the area of criminal insanity. In April of this year a spokeswoman for the Department of Justice commented that work on a piece of legislation which would be called the Criminal Law (Insanity) Bill was "well advanced"⁹⁹⁰. In response to a question in Parliament in May, the Minister for Justice responded that

"Proposals for the amendment and updating of our criminal insanity laws are at an advanced stage of preparation in my Department. I will bring forward suitable legislation in this area as soon as possible"⁹⁹¹.

In August 1995 the *status quo* remains unaltered and a diminished responsibility for Ireland remains barely out of reach. Diminished responsibility is the only realistic solution to the problems posed by reformulating the insanity defence. A defence of diminished responsibility for Irish law can also be justified on a philosophical level and I will now look at this to reinforce the suitability of diminished responsibility, as a solution to the problems inherent in the insanity defence.

⁹⁸⁸ *Irish Times* 23 Jun.1994

⁹⁸⁹ *Irish Times* 25 Jun.1994

⁹⁹⁰ *Irish Times* 26 Apr.1995

⁹⁹¹ Ir.P.Deb.,1995 p.31

3.5 FURTHER ARGUMENTS FOR A DIMINISHED RESPONSIBILITY DEFENCE IN IRISH LAW

In the course of this thesis I have established that diminished responsibility is the only solution to the medico/legal and moral controversy surrounding the insanity defence. Some further philosophical considerations militate in favour of a diminished responsibility defence in Irish law which I will now discuss under two mutually reinforcing headings, (a) the individualisation of excusing conditions and (b) partial excuses.

3.5.1 The Individualisation of Excusing Conditions

The first angle that requires consideration is whether or not there is a place in the Irish legal system for legally recognised excuses for criminal behaviour. Traditionally the Common Law's "fidelity to rules"⁹⁹² has made it loathe to consider the peculiarities of particular offenders⁹⁹³ with a view to excusing criminal conduct. Even insanity is often treated not as an excuse, but as a jurisdictional challenge to the court - something akin to the defence of infancy⁹⁹⁴. The defence of diminished responsibility is therefore an anomaly, focusing as it does on each individual defendant's abnormality, albeit with reference to a standard - that of substantially impaired responsibility⁹⁹⁵.

The common law's aversion to excusing conditions is coupled with the felt indispensability of the reasonable man standard, which provides a substitute for inquiries about the actor's character and culpability⁹⁹⁶. As Fletcher points out⁹⁹⁷ a system willing to assess character and culpability has no need for reasonable men whilst a system afraid to look squarely at the character and culpability of the

⁹⁹² G.P. Fletcher "The Individualization of Excusing Conditions" (1974) 47 S.Calif.L.Rev.1269 p.1305

⁹⁹³ ibid p.1300

⁹⁹⁴ ibid p.1272

⁹⁹⁵ F.Boland "Diminished Responsibility as a Defence in Irish Law" op cit

⁹⁹⁶ ibid p.1290

⁹⁹⁷ ibid

defendant must do so indirectly, by relying on standards like "the person of reasonable firmness".

In recent years, Irish law has shown increased deference to individualised excusing conditions, by dispensing with the reasonable man test in the defence of provocation⁹⁹⁸ and by reducing murder to manslaughter in the case of excessive self-defence⁹⁹⁹. By focusing on the particular situation of the defendant the Irish courts express "compassion for one of our kind caught in a maelstrom of circumstances"¹⁰⁰⁰. The Irish approach has brought individualised determinations of culpability, normally recognised in the extra-legal domains of sentencing, pardoning, arresting and choosing to prosecute¹⁰⁰¹, within the law. The effect is to provide a public and visible forum for the process of individualised assessment, which is infinitely preferable to leaving a maximum array of problems to be resolved in semi-secret administrative processes¹⁰⁰².

Even advocates of excuses may be opposed to partial excuses, however. Although the judicial climate in Ireland is favourable to the recognition of individualised excusing conditions, partial excuses (in particular diminished responsibility) as a "concession to human frailty", require independent examination.

3.5.2 Partial Excuses

Opponents of partial excuses base their argument on the assertion that an accused is either guilty or not guilty and there is no third alternative: "[t]o say that we are less willing to blame..a man if he does something wrong surely does not mean: "we are willing to blame him *less*, if he does something wrong."¹⁰⁰³"

⁹⁹⁸ *People (D.P.P.) v Sean MacEoin* [1978] I.R.27

⁹⁹⁹ *People (Attorney General) v Dwyer* [1972] I.R.416

¹⁰⁰⁰ G.P.Fletcher op cit p.1308

¹⁰⁰¹ ibid p.1307

¹⁰⁰² ibid

¹⁰⁰³ R.F.Sparks "'Diminished Responsibility' in Theory and in Practice" (1964) 27 M.L.R.9 p.16

In similar vein Lord Justice General Normand in Kirkwood v H.M. Advocate¹⁰⁰⁴ attacked the doctrine of diminished responsibility, saying

"The defence of impaired responsibility is somewhat inconsistent with the basic doctrine of our criminal law that a man, if sane, is responsible for his acts, and if not sane is not responsible".

This argument carries some weight to the extent that "impaired" or "diminished" mental capacity carries the implication that it is unfair to blame or punish the offender at all. However as Gordon¹⁰⁰⁵ and Wasik¹⁰⁰⁶ note, if "responsibility" is replaced by the phrase "liability to punishment", the plausibility of the above argument tends to disappear. This is what the English Legislature intended by "mental responsibility" in section 2¹⁰⁰⁷ and it is unfortunate that they did not express themselves more clearly. This replacement reveals more clearly the relationship which exists between legal and moral ascriptions of responsibility in the context of serious criminal offences¹⁰⁰⁸. In moral responsibility there is certainly gradation in the efficacy of various excuses, and it may be that some take a form akin to partial excuses

"because it always has to be remembered that few excuses get us out of it completely; the average excuse, in a poor situation, gets us only out of the fire into the frying pan"¹⁰⁰⁹.

Uniacke takes the same stance, saying

"the question of an agent's responsibility for a particular act or effect of an act need not be 'either-or'; and because acts can be voluntary to a degree, and agents more or less responsible, some excuses can lessen,

¹⁰⁰⁴ 1939 J.C.36 p.40

¹⁰⁰⁵ G.H.Gordon *Criminal Law* (2nd ed) (Edinburgh, 1978) p.381

¹⁰⁰⁶ M.Wasik "Partial Excuses in the Criminal Law" (1982) 45 M.L.R.516 p.517

¹⁰⁰⁷ Discussed *below*, section 3.7

¹⁰⁰⁸ M.Wasik op cit p.517

¹⁰⁰⁹ *ibid*

without eliminating, the agent's culpability. In the case of any *partial* excuse, we regard the agent as blameworthy for the wrongful conduct, but less so, given this excuse, than we would judge him to be without the excuse, all else being equal"¹⁰¹⁰.

Partial excuses also have a more practical justification. In a situation where the greater offence is made out in law but the jury feels that it is morally inappropriate to convict, the existence of a partial excuse prevents them convicting of the full offence or acquitting "perversely" when neither reflects their true finding¹⁰¹¹. The more serious the offence charged the greater the pressure to avoid convicting of an offence involving undeserved moral stigma¹⁰¹². Hence on a moral level this middle verdict may be regarded as more meaningful since it seeks to relate the offence of which the defendant has been convicted more closely to his moral culpability¹⁰¹³. That the diminished responsibility defence enables the jury to give expression to their true feelings about an accused's culpability has been illustrated vividly by an Irish jury at the trial for murder of two young Limerick women in 1994¹⁰¹⁴. After Johnson J. had told the jury that there was no concept of diminished responsibility in Irish law, the jury retired to consider their verdict and returned saying they had a problem with the inapplicability of diminished responsibility and the state of the accused's mind. The defendants had suspected their victim of witnessing the beating up (leading to the death) of their father and lover. The jury duly found the defendants guilty of murder, after which Johnson J. said that he had no alternative but to impose the mandatory sentence of life imprisonment.

Since the judge's deliberations on sentence must start from the declared verdict, it is important that this should not mislead him as to the jury's view of the case¹⁰¹⁵. If further questioning of the jury by the judge is to be ruled out because of its

¹⁰¹⁰ S.Uniacke "What are Partial Excuses to Murder?" in Stanley Meng Heong Yeo *Partial Excuses to Murder* (Sydney, 1991) p.11

¹⁰¹¹ M.Wasik op cit p.520

¹⁰¹² ibid.531

¹⁰¹³ ibid p.520

¹⁰¹⁴ *Irish Times* 24 Mar.1994

¹⁰¹⁵ M.Wasik op cit p.520

implications in terms of time and money, then linking the verdict as closely as possible to the defendant's culpability is the best that can be attained¹⁰¹⁶.

Wasik justifies the recognition of partial excuses by imagining a "scale of excuse", running downwards from excusing conditions through partial excuses to mitigating excuses¹⁰¹⁷. Excuses towards the higher end of the scale are those where maximum moral pressure for exculpation outweighs reasons of policy and practicality for not permitting the excuse (e.g. automatism)¹⁰¹⁸. Those towards the lower end of the scale, while they may be morally significant, are outweighed by practical and policy considerations (e.g. a general excusing condition of good motive)¹⁰¹⁹. He claims that partial excuses fall into the centre of this range and exhibit a fine balance between rival considerations¹⁰²⁰. Some criminal excuses are so morally and legally significant that they must be considered prior to the verdict¹⁰²¹. These are excuses towards the higher end of the "scale of excuses" where maximum exculpatory power outweighs considerations of policy and expedience for not admitting the excuse as an excusing condition¹⁰²². To transfer these issues to the sentencing stage, as some would do, would sacrifice individual culpability to social policy¹⁰²³. On the other hand some excuses, towards the lower end of the scale may properly be dealt with just by the sentencer¹⁰²⁴.

A further consideration militating in favour of a partial defence of diminished responsibility or any other partial excuse, is the need for the law to maintain the community's respect by grading its condemnation according to the moral turpitude of the offender *as the community evaluates it*¹⁰²⁵. As psychological abnormality bears on

¹⁰¹⁶ ibid

¹⁰¹⁷ ibid p.524 & 525

¹⁰¹⁸ ibid p.525

¹⁰¹⁹ ibid

¹⁰²⁰ ibid

¹⁰²¹ ibid p.531

¹⁰²² ibid pp.531 & 532

¹⁰²³ ibid p.532

¹⁰²⁴ ibid

¹⁰²⁵ G.E.Dix "Psychological Abnormality as a Factor in Grading Criminal Liability: Diminished Capacity, Diminished Responsibility and the Like" (1971) 62 J.Crim.L., Criminol. and Pol.Sci.313 p.332

moral turpitude, considerations of public respect for the law require an investigation into whether the defendant was less responsible owing to his mental affliction¹⁰²⁶.

The decision to reduce murder to manslaughter in the case of excessive self-defence shows that Ireland's judicial climate is favourable to the reception of partial excuses. A diminished responsibility defence for Irish law can be justified on several levels. Firstly, it may be viewed as an answer to the impossibility of satisfactorily reformulating the insanity defence. Because the insanity plea is premised on full or absent responsibility it fails to deal with those offenders who are medically insane but partially responsible for their actions. In this manner it would resolve the long-standing medico-legal conflict over the insanity defence.

The wide dispositional consequences attached to the defence would provide a solution to the questionable reconcilability of Irish insanity law with the Irish Constitution and the European Convention on Human Rights, by leaving the insanity defence to deal with those offenders whose disorder warrants treatment and custody. Finally, it would provide a means of focusing on the particular situation of a mentally disordered offender and excusing conduct that is less blameworthy than that of a normal criminal defendant.

Diminished responsibility would remedy several defects in the Infanticide Act, 1949, by providing a humane disposal firstly, for the woman who is mentally disturbed following childbirth but who kills an older child or somebody else's. Secondly, it would deal compassionately with the same woman who kills her child when it has passed one year of age. Thirdly, a defence of diminished responsibility would extend the compassion granted to women after childbirth to fathers or other relatives suffering from abnormality of mind. Diminished responsibility now has a considerable following in Ireland¹⁰²⁷. As one recent Irish commentator has pointed out

¹⁰²⁶ ibid

¹⁰²⁷ eg. "Guilty but Insane" Verdict Clarified (1991) 9 I.L.T.53; F.McAuley op cit p.92

"the defence of diminished responsibility *stricto sensu* represents the best, and certainly the most realistic, solution to the problem posed by the sane but mentally partially impaired defendant; and consequently..the real question is not whether but in what form, it should be introduced in Ireland?"¹⁰²⁸.

3.6. THE WORDING OF AN IRISH DIMINISHED RESPONSIBILITY DEFENCE

The remainder of this Chapter will concentrate on the appropriate form of an Irish diminished responsibility defence. By drawing on the English experience, I will lay down some guidelines which it is suggested that the Irish Legislature should follow in formulating the defence. These will not be limited to its wording but will also involve the procedural matters of burden of proof, charges and disposal.

3.6.1 Abnormality of Mind

Section 2(1) of the Homicide Act provides

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from 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 or omissions in doing or being a party to the killing.

Despite the parenthesis in section 2, the meaning of "abnormality of mind" caused considerable confusion during the early years of the defence. This uncertainty, which also applied to the meaning of substantially impaired mental responsibility, discussed *below*, may be attributed to hasty legislation and inadequate debate by Government supporters who were largely ignorant of the issue that they were voting

¹⁰²⁸ F.McAuley op cit p.179

on. Had the parliamentarians taken the time, they could have exposed the uncertainty of the defence's terms and agreed on its limits, incorporating them within section 2.

In Spriggs¹⁰²⁹ the prosecution contended that "mind" meant "intelligence" and that a psychopath with a high intelligence quotient could not, therefore, be suffering from an abnormality of mind. Since the judge was determined not to offer his own interpretation of the section¹⁰³⁰ he did not warn the jury against this one and no doubt the jury were influenced by prosecuting counsel's contention when they found Spriggs guilty of capital murder.

The following exchange which is reported to have occurred during the hearing of R v Walden¹⁰³¹ by the Court of Criminal Appeal, illustrates the difficulty which faced judges in the early years of the defence¹⁰³²:

Hilberry: "suppose the jury ask what they are to understand by abnormality of mind. If the judge can't tell them we are getting very near to trial by doctor. What on earth does 'substantially impaired his mental responsibility' mean? Does anyone know?"

Counsel: "No except for the medical men."

It was not until Byrne's case that the Court of Appeal at last delivered a considered interpretation¹⁰³³. There the meaning of "abnormality of mind" was clarified by Lord Parker who held that it meant

"a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a

¹⁰²⁹ [1958] 42 Cr.App.R.69

¹⁰³⁰ N.Walker *Crime and Insanity in England* Vol.1 (Edinburgh, 1968) p.154

¹⁰³¹ (1959) 43 Cr.App.R.201

¹⁰³² R.F.Sparkes op cit p.14, f.n.12

¹⁰³³ N.Walker op cit p.154

rational judgment as to whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment"¹⁰³⁴.

What kinds of causes are "inherent", what kinds of trauma will count as "injury", and what is meant by "disease" are not exactly questions which are easy or assured of a confident judicial answer, however¹⁰³⁵. Variations in the weight given to the parenthetical limitation on "abnormality of mind" have been able to continue throughout the history of the section because of the courts' failure to elucidate the meaning of the parenthesis¹⁰³⁶.

As late as 1975, the Butler Committee on Mentally Abnormal Offenders described "abnormality of mind" as "an extremely imprecise phrase", even as limited by the parenthesis and defined by the Court of Appeal in Byrne¹⁰³⁷. They found that evidence is often stretched due to the humanity of the medical profession so that psychopathic personality, reactive depressions and dissociated states are testified to be due to "inherent causes" within the section¹⁰³⁸. Although some psychiatrists have used section 2 creatively, it seems that others have been less aware of the section's potential for flexible reading¹⁰³⁹. Thus the fate of a number of people charged with murder since 1957, has turned on the robustness and sophistication of their expert witness¹⁰⁴⁰.

Ambitious witnesses, like Dr.Katherina Dalton who has testified to the existence of P.M.T. in a number of killings, have widened the ambit of the defence and permitted a more humane outcome in deserving circumstances. According deference to the medical view of abnormality of mind has led to the evolution of a happy partnership between the legal and medical professions on the issue of diminished responsibility. This is exemplified by the general practice of accepting the

¹⁰³⁴ [1960] 3 All E.R.1 p.4

¹⁰³⁵ E.Griew "The Future of Diminished Responsibility" [1988] Crim.L.R.75 p.77

¹⁰³⁶ *ibid* p.78

¹⁰³⁷ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.19.5

¹⁰³⁸ *ibid*

¹⁰³⁹ E.Griew op cit p.79

¹⁰⁴⁰ *ibid*

plea of guilty to diminished responsibility manslaughter, where unanimous medical evidence is forthcoming (80% of diminished responsibility cases¹⁰⁴¹) thus saving a considerable amount of court time and expense and avoiding unnecessary distress to the defendant and relatives of the deceased.

Although the Butler Committee's preference was for abolition of the mandatory life sentence and the defence of diminished responsibility¹⁰⁴², in the event of retention of the mandatory life sentence they wished to keep section 2 *in its essentials* (emphasis added) but with an improvement in the wording¹⁰⁴³. In this respect they proposed the substitution of "abnormality of mind (whether due to arrested or retarded development of mind or any inherent causes or induced by disease or injury)" with the requirement of medical or other evidence that the defendant was, at the time of the act, suffering from a form of mental disorder, as defined in section 4 of the Mental Health Act, 1959¹⁰⁴⁴.

Section 4(1) of the Mental Health Act, 1959 provides

"In this Act "mental disorder" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind; and "mentally disordered" shall be construed accordingly".

The Criminal Law Revision Committee in its Fourteenth Report *Offences Against the Person*, expressed the reservation that the Butler Committee's rewording would be to some extent restrictive and would exclude some offenders who are at present regarded by the courts as falling within section 2, namely, the case of the depressed father who kills a severely handicapped subnormal child or a morbidly jealous person who kills his or her spouse¹⁰⁴⁵. In this matter they consulted the medical

¹⁰⁴¹ S.Dell *Murder into Manslaughter* (Oxford, 1984) p.28

¹⁰⁴² Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.19.14

¹⁰⁴³ ibid para.19.17

¹⁰⁴⁴ ibid

¹⁰⁴⁵ Criminal Law Revision Committee 14th Report *Offences Against the Person* Cmnd 7844 (London, 1980) para.92

advisers to the Department of Health and Social Security who felt that the proposed rewording would not exclude the kind of cases they had in mind¹⁰⁴⁶. Their proposed rewording of the diminished responsibility defence did not, therefore, alter the requirement of a mental disorder within the meaning of section 4 of the Mental Health Act, 1959.

The Butler Committee said that its proposed re-wording "would..not materially alter the practical effect of the section"¹⁰⁴⁷. However, "any other disorder or disability of mind" in section 4(1) of the Mental Health Act 1959 is extremely wide and like mental disorder, has no limiting parenthesis akin to section 2 of the Homicide Act, 1957¹⁰⁴⁸. It is therefore possible that some psychiatrists might be emboldened to identify transient disorders of mind for the purpose of diminished responsibility defences, that because of anxious respect for the language of the parenthesis, they would not formerly have felt able to advance as relevant¹⁰⁴⁹. Some prosecutors and judges might feel similarly liberated¹⁰⁵⁰. However, given that according the medical profession autonomy in the working of section 2 has proved satisfactory, it should not be assumed that this change in the wording of the diminished responsibility defence would lead to an unsavoury redefinition of the boundary between murder and manslaughter by medical witnesses. It might, however, lead to inconsistency in the operation of the defence.

The Butler Committee thought that a state of intoxication, if not expressly excluded, would be a mental disorder within the 1959 Mental Health Act for the purpose of their revised insanity defence¹⁰⁵¹. However, they made no attempt to exclude this state from the ambit of the new diminished responsibility defence¹⁰⁵². This would widen the diminished responsibility defence considerably. As a result, Clause 54 of the Draft Criminal Code Bill expressly excludes intoxication from the

¹⁰⁴⁶ ibid

¹⁰⁴⁷ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.19.17

¹⁰⁴⁸ E.Griew op cit p.79

¹⁰⁴⁹ ibid p.80

¹⁰⁵⁰ ibid

¹⁰⁵¹ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.18.23

¹⁰⁵² E.Griew op cit p.81

ambit of the defence. However, it has done this by adopting the Fenton approach. Even if the intoxicant combined with a pre-existing abnormality of mind to produce substantially impaired responsibility, the jury would have to be directed to ignore the effect of the intoxication and to ask if the defendant would have been of diminished responsibility in the absence of intoxicants.

The requirement of "medical or other evidence" of a mental disorder within section 4(1) of the Mental Health Act, 1959 may mean that medical evidence would not always be necessary¹⁰⁵³. This would threaten to undermine the medical profession's autonomy in the working of the diminished responsibility defence.

The Butler Committee was concerned to reconcile the meaning of mental abnormality with the meaning of mental disorder in civil committal procedures. As the Irish law on civil committal is also in need of reform, no help can be obtained from the Irish Mental Treatment Act, 1945, which provides no definition of mental disorder but leaves the doctor to apply his own subjective criteria as to who should and who should not be committed¹⁰⁵⁴. Recent government proposals for reform of the 1945 Act have also failed to provide a definition of mental disorder. Hence, a definition of abnormality of mind for the purpose of a diminished responsibility defence, will provide a challenge for the Irish Legislature when it finally decides to act.

When devising an Irish defence of diminished responsibility a definition of mental disorder that the Irish psychiatric profession is familiar with would save all the confusion that followed in the wake of the Homicide Act, 1957. If it is made clear that the meaning of mental disorder/abnormality of mind is a medical question, it will not be necessary for the Judiciary to give it meaning as they were forced to do in England in the early years of the defence. This would also allow the medical profession considerable autonomy in the working of the defence. However, in the absence of a definition of mental disorder in the 1945 Act, the Irish Legislature will have to

¹⁰⁵³ ibid p.80

¹⁰⁵⁴ The *Irish Press* 29 Sept.1986

consider two options: Firstly, giving doctors testifying as to diminished responsibility the same latitude as they enjoy under civil committal procedure or secondly, providing a definition of mental disorder. If they chose the second, the best alternative is to follow Butler's proposal on the requisite disorder subject to the exclusion of intoxication *per se* rather than when combined with another abnormality of mind¹⁰⁵⁵. There should also be a requirement of medical evidence in relation to any mental disorder tendered as evidence of diminished responsibility.

3.6.2 Substantially Impaired Mental Responsibility

The above phrase has led to a wealth of academic commentary, most of which has done nothing to elucidate its meaning. Lady Wooton has suggested three possible alternative meanings¹⁰⁵⁶: (i) Irresponsible, in the sense of antisocial or reprehensible behaviour; (ii) Irresponsive, in the sense that the individual does not respond to the stimuli of reward and punishment in the same way as a normal individual; and (iii) Diminished responsibility to resist temptation or, conversely, excessive sensibility to temptations not felt by others to be overwhelming; and in consequence, diminished responsibility in the eyes of God and Man.

Wooton dismisses (ii) as too sophisticated for the ordinary juryman and (i), which would mean labelling all criminals as irresponsible and would obliterate the very distinction that section 2 requires us to draw¹⁰⁵⁷. If (iii) is correct, she says, impaired responsibility becomes the counterpart of uncontrollable impulse¹⁰⁵⁸. Her view is similar to that of Professor Hart who suggests that "mental responsibility" in section 2 refers to the defendant's "capacity to control his actions"¹⁰⁵⁹; it is "the name or description of a psychological condition"¹⁰⁶⁰. Elsewhere however, he refers to the capacities of "understanding" and of "reasoning" as well as "of control of conduct"

¹⁰⁵⁵ The difficulties inherent in this approach to a combined defence of intoxication and diminished responsibility have been discussed *above* in section 2.

¹⁰⁵⁶ Lady Wooton "Diminished Responsibility": A Layman's View" (1960) 76 L.Q.R.224 p.231

¹⁰⁵⁷ *ibid*

¹⁰⁵⁸ *ibid*

¹⁰⁵⁹ H.L.A.Hart *Punishment and Responsibility* (Oxford, 1968) p.202

¹⁰⁶⁰ *ibid* p.220

and expresses the view that a person's responsibility for his actions in the sense of such "complex psychological characteristics..may intelligibly be held to be diminished or impaired"¹⁰⁶¹.

Griew however, believes that "Capacity to control actions" is too restricted a translation of "mental responsibility" and that an amalgam of capacities or "psychological characteristics" is, as an alternative translation, too uncertain to be convincing¹⁰⁶². Moreover, such an interpretation does not fit the language of the section¹⁰⁶³.

Walker insists¹⁰⁶⁴ that it does not make sense to paraphrase "mental responsibility" as accountability or answerability, since in our usage, it is the individual as a whole, not his "mind" which is accountable or answerable. Sparks is also of the view that mental responsibility does not mean answerability or liability to punishment. In view of the marginal note to section 2 which says "persons who suffer from diminished responsibility", he notes¹⁰⁶⁵ that

"liability to punishment is not, as abnormality of mind is, something which people are said to suffer from; nor would they be said to suffer because that liability to punishment was impaired".

Instead, Walker's view is that "mental responsibility" is used as if responsibility were a quality of mind and is something which can be "impaired", a word which modern usage applies to intelligence, memory, hearing and sight¹⁰⁶⁶. In this view Walker has McAuley's concurrence:

"s2 appears to be based on the latter-day Scots assumption that diminished or impaired mental responsibility is a specific

¹⁰⁶¹ ibid pp.227-228

¹⁰⁶² E.Griew "Reducing Murder to Manslaughter: Whose Job?" 12 J.Med.Ethics 18 p.19

¹⁰⁶³ ibid

¹⁰⁶⁴ N.Walker op cit p.152

¹⁰⁶⁵ R.F.Sparks op cit p.13

¹⁰⁶⁶ N.Walker op cit pp.151 & 152

psychopathological state, and not just a convenient label for the disparate psychological factors that might limit a defendant's legal accountability for his actions, much less a procedural device for obviating the need to impose a fixed penalty in murder cases"¹⁰⁶⁷.

Neither Walker nor McAuley suggests that the "concept" he finds in section 2 corresponds to any reality¹⁰⁶⁸. Rather, in order to make sense of the section, they refer to "a creature that does not exist"¹⁰⁶⁹.

The problem is that section 2 is elliptical "almost to the point of nonsense"¹⁰⁷⁰. If as suggested by Griew¹⁰⁷¹, the irreconcilable words "impaired..mental" and "responsibility" are forced apart, the section begins to make sense: He had an abnormality of mind (of appropriate origin). This had a substantial adverse effect upon one or more relevant functions or capacities (of perception, judgment, feeling, control)¹⁰⁷². In the context of the case this justifies the view that culpability is substantially reduced. The outcome is diminished liability: manslaughter¹⁰⁷³. Its elliptical nature explains the confusion in the House of Commons during the debates on the Homicide Bill and such expressions of discomfort as: "the Bill is just as far from clear to many of us who have been considering it for that considerable length of time"¹⁰⁷⁴.

If the words are compacted together in a different form we end up with: his abnormality of mind is of such consequence in the context of this offence, that his legal liability for it ought to be reduced¹⁰⁷⁵. This is almost identical to what the judges who gave evidence to the Butler Committee, gleaned from the section:

¹⁰⁶⁷ F.McAuley op cit p.159; See also P.Arenella "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage" (1977) 77 Columbia L.Rev.827 p.850

¹⁰⁶⁸ E.Griew "Reducing Murder to Manslaughter: Whose Job?" op cit p.19

¹⁰⁶⁹ ibid

¹⁰⁷⁰ ibid

¹⁰⁷¹ ibid p.20

¹⁰⁷² ibid

¹⁰⁷³ ibid

¹⁰⁷⁴ Mr.A.Greenwood (M.P.for Rossendale) H.C.deb.1956, Vol.561, Col.489

¹⁰⁷⁵ ibid

"the defendant has shown recognisably abnormal mental symptoms and..in all the circumstances it would not be right to regard his act as murder in the ordinary sense"; so "it is open to the jury to bring in a verdict of manslaughter"¹⁰⁷⁶.

Pace Glanville Williams, who asserts that it would make no sense to talk about substantial impairment of legal responsibility, because legal responsibility in the sense of liability to conviction either exists or does not¹⁰⁷⁷, we are not talking about liability to conviction but liability to be convicted of manslaughter rather than murder.

If "mental responsibility" is a legal or a moral question then it follows that substantially impaired mental responsibility is for the jury to determine. This is what the Court of Appeal decided in Byrne. However, under the Homicide Act the jury is provided with no criterion for determining whether or not responsibility is substantially impaired.

Glanville Williams foresaw in the early years of the defence that

"a refusal of the expert to express an opinion that mental abnormality has substantially impaired the accused's mental responsibility may have the unintended effect of leading the jury to suppose that the expert believes mental responsibility to be unimpaired¹⁰⁷⁸."

The difficulty of the jury's task explains the courts' indulgent attitude to medical testimony on the issue of substantially impaired mental responsibility. This attitude was highlighted in the relatively recent Court of Appeal decision of Campbell where it was said that there was no *prima facie* evidence of diminished responsibility because the psychiatric witness "never addressed himself in his evidence to the final matter which would have to be proved by the defence..namely

¹⁰⁷⁶ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para 19.4

¹⁰⁷⁷ *Textbook of the Criminal Law* (2nd ed) (London, 1983) p.686

¹⁰⁷⁸ Glanville Williams "Diminished Responsibility" (1961) 1 Med.Sci & L.41 p.48

that the abnormality of mind was such as substantially to impair the mental responsibility of the appellant for his acts"¹⁰⁷⁹.

Hence Spencer says that it is "wise" for psychiatrists to offer an opinion on substantially impaired mental responsibility in their medical report¹⁰⁸⁰. Neustatter advises fellow psychiatrists to express an opinion on diminished responsibility in their preliminary report "as that is what counsel wants"¹⁰⁸¹. Similarly, Power recommends that when a doctor is issuing a psychiatric report indicating that, in his opinion, diminished responsibility is applicable to the accused, the specific form of mental disorder should be described and the words "abnormality of mind as substantially to impair his mental responsibility for his acts in doing the killing" should be written in full¹⁰⁸².

According to Dell¹⁰⁸³ defence counsel will not raise section 2 unless they have received the green light on its moral aspects from one and preferably two psychiatrists. Her study revealed not one case in which the defence lawyers were without a pre-trial report in which a psychiatrist said he thought responsibility was substantially diminished¹⁰⁸⁴. So in practice, it is the doctors who decide whether the defence can be attempted¹⁰⁸⁵. It is also the doctors who decide whether the defence will succeed in the 80% of diminished responsibility cases where the medical evidence of diminished responsibility is unanimous and the court accepts the plea. And it is the doctors who dictate the success of the defence in those cases that reach the courts, by their undoubted influence on the jury's conclusion when they testify on the ultimate issue of substantially impaired mental responsibility. The amicable partnership between judge and expert witness in diminished responsibility cases, coupled with the arduous task which the jury would otherwise face, explains the

¹⁰⁷⁹ (1987) 84 Cr.App.R.255 p.259

¹⁰⁸⁰ S.Spencer Homicide, Mental Abnormality and Offence in *Mentally Abnormal Offenders* (Toronto, 1984) p.99

¹⁰⁸¹ "Psychiatric Aspects of Diminished Responsibility in Murder" (1960) 28 Medico-Legal Journal 92 p.93

¹⁰⁸² D.J.Power "Diminished Responsibility" (1967) 7 Med.Sci & L.185 p.185

¹⁰⁸³ S.Dell "The Mandatory Sentence and Section 2" (1986) 12 Journal of Med.Ethics 28 p.30

¹⁰⁸⁴ ibid

¹⁰⁸⁵ ibid

failure of the courts to differentiate the role of the expert witness from that of the jury¹⁰⁸⁶.

Undoubtedly the "nonsensical quality of the statutory language"¹⁰⁸⁷ has created difficulty for the psychiatrist. The Butler Committee on Mentally Abnormal Offenders came down harshly on "Mental Responsibility", "a phrase not to be found elsewhere in any statute", which "has created difficulty both for doctors and for jurors"¹⁰⁸⁸. Several medical witnesses had pointed out to the Committee that the difficulty is made worse by the use of the word "substantial"¹⁰⁸⁹. Similarly, Dell has found that "although the presence or absence of mental responsibility is not a medical matter, doctors grapple with it"¹⁰⁹⁰.

Rather than devoting their attention exclusively to rewording the requirement of substantially impaired mental responsibility, the Butler Committee opted to reinforce the line between expert witness and jury. Deciding that it is either a concept of law or of morality rather than a clinical fact relating to the defendant, they found it "odd" that psychiatrists should be asked and agree to testify as to legal or moral responsibility, and even more surprising that courts are prepared to hear that testimony¹⁰⁹¹. As said above, in the event of retention of the mandatory life sentence they wished to keep section 2 *in its essentials* (emphasis added) but with an improvement in the wording. The wording they proposed¹⁰⁹² was

"Where a person kills or is party to the killing of another he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in s4 of the Mental Health Act 1959 and if, in the opinion of the jury, the mental disorder

¹⁰⁸⁶ E.Griew "The Future of Diminished Responsibility" op cit p.86

¹⁰⁸⁷ ibid p.87

¹⁰⁸⁸ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.19.5

¹⁰⁸⁹ ibid para.19.5

¹⁰⁹⁰ S.Dell "Diminished Responsibility Reconsidered" [1982] Crim.L.R.809 p.813

¹⁰⁹¹ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.19.5

¹⁰⁹² ibid para.19.17

was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter".

The Butler Committee felt that the omission of the reference to impairment of mental responsibility would in theory, slightly widen the defence, but they felt that this would not matter as the judge could still impose the life sentence where he felt that this was justified¹⁰⁹³. This is the wording which was proposed for the diminished responsibility defence advocated before the Irish Supreme Court in People (D.P.P.) v Mahony.

The Criminal Law Revision Committee, when reporting in 1980, agreed that the wording of section 2 is unsatisfactory¹⁰⁹⁴. However they expressed the reservation that the Butler Committee's rewording may in one respect be too lax¹⁰⁹⁵. Seeing as the judge would have to give some guidance to the jury as to what extenuating circumstances ought to reduce the offence, and in practice that means that the mental disorder has to be substantial enough to reduce the offence to manslaughter, they considered that the definition should be tightened up so as to include that ingredient upon which the jury would have to be directed, which would give them the necessary guidance¹⁰⁹⁶. Hence they suggested that "the mental disorder [should be] such as to be a substantial enough reason to reduce the offence to manslaughter"¹⁰⁹⁷. Whether this would provide adequate guidance for a jury deciding a diminished responsibility case, will be discussed further *below*.

However a flaw in the wording is the words "in the opinion of the jury". Dell has found that 86.5% of diminished responsibility defences are accepted outright by the Crown and that only 20% reach the jury¹⁰⁹⁸. Some provision allowing the judge to decide if the mental disorder is "a substantial enough reason to reduce the offence to

¹⁰⁹³ ibid

¹⁰⁹⁴ Report of the Criminal Law Revision Committee 14th Report *Offences Against the Person* op cit para.92

¹⁰⁹⁵ ibid para.93

¹⁰⁹⁶ ibid

¹⁰⁹⁷ ibid

¹⁰⁹⁸ S.Dell "Diminished Responsibility Reconsidered" op cit p.811

"manslaughter", is therefore necessary¹⁰⁹⁹. This has been embodied in Clause 56 of the Draft Criminal Code Bill:

- (1) A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he is suffering from such abnormality as is a substantial enough reason to reduce his offence to manslaughter.
- (2) In this section "mental abnormality" means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication
- (3) Where a person suffering from mental abnormality is also intoxicated, this section applies only where it would apply if he were not intoxicated.

The Butler Committee's reformulation has the effect of bringing "into sharper focus" the "true functions of the judge, the expert witness and the jury in the criminal trial"¹¹⁰⁰. The jury would have to decide if the offence should be reduced to manslaughter, a task akin to that suggested by the Royal Commission on Capital Punishment in 1953 in relation to the insanity defence and which was rejected by the D.C. Court of Appeals in U.S. v Brawner¹¹⁰¹. Although the Butler reformulation has manifested a far superior mastery of the English language than the draftsmen of 1957, Griew has predicted that judges, having to operate the law in the revised form, would quickly become embarrassed by a difficulty in it that has, up to now, been kept partially concealed by the working of the section¹¹⁰² - its failure to provide adequate guidance for the jury. As it stands, section 2 is so badly worded that it can be made to work - and to work better than its framers intended¹¹⁰³.

The writer's opinion is that an Irish diminished responsibility defence should be phrased in terms which allow the medical witnesses to express a conclusion on the issue of impaired or diminished responsibility or whether the disorder should reduce

¹⁰⁹⁹ ibid p.817

¹¹⁰⁰ E.Griew "The Future of Diminished Responsibility" op cit p.84

¹¹⁰¹ See section 1.3, *above*.

¹¹⁰² ibid p.86

¹¹⁰³ ibid p.87

the offence to manslaughter. A definition precluding such testimony would place an inordinate burden on the jury and medical testimony to this effect would have to be allowed in order to facilitate the operation of the defence. This is an objection which may be levied at the Henchy Committee's proposed wording of an Irish defence of diminished responsibility. Their test provided that, if the accused satisfied the jury that at the time of the alleged offence he was suffering from mental disorder which, while not such as to justify a finding of not guilty by reason of mental disorder, was such as to diminish substantially his responsibility for the act or omission charged, the jury might find him guilty of manslaughter on the ground of diminished responsibility¹¹⁰⁴. The wording of the Henchy Committee's test suggests that the jury would have to be directed on the degree of mental disorder that would *exempt* from responsibility before they could consider the issue of *impaired* responsibility. The complex nature of this test would be likely to cause considerable confusion.

The Law Commission's reformulation is to be preferred to that of Butler because of its failure to limit the expert's role. For this reason it would be a helpful model for the Irish legislature, in the absence of a definition of mental disorder under Irish civil commitment legislation, and subject to the requirement of medical evidence and the treatment of intoxication as part of the relevant evidence in deciding the issue of diminished responsibility¹¹⁰⁵.

3.7 BURDEN OF PROOF

A few issues remain to be considered, which lie within the Legislature's power to deal with when legislating for a diminished responsibility defence. The first is the placement of the burden of proving diminished responsibility. Like the defendant pleading insanity, a diminished responsibility defendant must satisfy the jury that he

¹¹⁰⁴ Third Interim Report of the Interdepartmental Committee on Mentally Ill and Maladjusted Persons *Treatment and Care of Persons Suffering from Mental Disorder who Appear Before the Courts on Criminal Charges* op cit p.5, para 9.

¹¹⁰⁵ F.Boland "Intoxication and Criminal Liability" op cit

was suffering from diminished responsibility on a balance of probability¹¹⁰⁶. The Butler Committee recommended placing the burden of proving that the defendant did the act (or made the omission) with the requisite state of mind, on the prosecution¹¹⁰⁷. As with other defences in the criminal law, the Committee felt that the only burden resting on the defendant in diminished responsibility cases (and insanity cases) should be that of adducing evidence to raise the issue¹¹⁰⁸. The rationale behind the Committee's proposal seems to have been the perceived anomaly of the issue of burden of proof in relation to the defences of insanity and diminished responsibility¹¹⁰⁹.

The Criminal Law Revision Committee also felt that the defence of diminished responsibility should fall under the general rule regarding burden of proof¹¹¹⁰. They pointed out that it is "unusual" for the burden of proof to be placed on the defendant, in serious charges in relation to his state of mind¹¹¹¹. They also felt that, however happy lawyers may be with the difference between being sure and being satisfied on the balance of probabilities (adding "if indeed any are"), juries are probably confused by these subtleties and by the different placing of the burden of proof for different offences¹¹¹². The Criminal Law Revision Committee expressed their confidence in the judges to ensure that defences which have no proper basis on the evidence are withdrawn from the jury¹¹¹³.

The writer's view is that when legislating, the Dail should avail of the opportunity to introduce consistency in the criminal law by placing the burden of proof on the prosecution in relation to diminished responsibility and insanity. This approach has already been taken in the Infanticide Act, 1949. By placing the burden of proof on the prosecution McNaghten's ghost will finally have been laid to rest.

¹¹⁰⁶ *McNaghten's* case is the origin of this unsatisfactory practice.

¹¹⁰⁷ Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 6244 op cit para.19.18

¹¹⁰⁸ *ibid*

¹¹⁰⁹ See *ibid* paras.18.39-18.41

¹¹¹⁰ Criminal Law Revision Committee 14th Report *Offences Against the Person* Cmnd 7844 op cit para.94

¹¹¹¹ *ibid*

¹¹¹² *ibid*

¹¹¹³ *ibid*

3.8 CHARGES OF MANSLAUGHTER BY REASON OF DIMINISHED RESPONSIBILITY

As mentioned earlier, on a charge of murder, a plea of guilty to manslaughter on the grounds of diminished responsibility may be accepted by the court. This happens in about 80% of cases¹¹¹⁴. The Butler Committee recommended in addition, that it should be possible, where the prosecution are in possession of evidence indicating that a defence under the section can be made out, for them to charge manslaughter in the first instance rather than murder¹¹¹⁵. By way of example they instanced as appropriate for this procedure, the case where a woman has killed her child in tragic circumstances¹¹¹⁶, the case either falling outside the offence of infanticide (because the child is over the specified age) or that offence having been abolished in accordance with their recommendation to this effect¹¹¹⁷. The Committee stipulated that the prosecution would be likely to adopt this course only when it is clear that the defence were agreeable to it. If the defence wished to resist evidence of mental disorder the charge should be murder as now¹¹¹⁸. A similar recommendation, although in relation to the insanity defence, had been made in 1956 by the Heald Committee¹¹¹⁹. Although proposing the introduction of the defence of diminished responsibility into English law, they did not advocate the use of this procedure in relation to it.

The Criminal Law Revision Committee have endorsed the Butler Committee's recommendation, being of the opinion that the mental condition of a disturbed person is not likely to be improved by having a charge of murder outstanding¹¹²⁰. They also felt that it cannot be right that charges should be proffered in the most solemn way known to the law, i.e. on indictment, when the prosecution know that there is a

¹¹¹⁴ S.Dell "Diminished Responsibility Reconsidered" op cit p.811

¹¹¹⁵ Report of the (Butler Committee) on Mentally Abnormal Offenders Cmnd.6244 op cit para 19.19

¹¹¹⁶ ibid

¹¹¹⁷ ibid para.19.26

¹¹¹⁸ ibid para 19.19

¹¹¹⁹ Report of the (Heald) Committee *Some Suggestions for the Reform of the Law Relating to Murder in England* (London, 1956) p.17

¹¹²⁰ Criminal Law Revision Committee 14th Report *Offences Against the Person* Cmnd 7844 op cit para.95

defence to the charge which is likely to succeed¹¹²¹. In this the Criminal Law Revision Committee had the support of the Law Society, the Association of Chief Police Officers, the Metropolitan Police Solicitor, the Women's National Commission and the National Council of Women in Great Britain. The Senate of the Inns of Court and the Bar also approved of this recommendation but expressed the reservation (which the Committee had already appreciated) that implementing the suggestion would not be easy¹¹²². They gave no indication, however, that *operating* the suggestion would present any difficulty.

Charges of diminished responsibility manslaughter would be a welcome addition when the Irish Legislature decides to act. At present the prosecution can charge a woman with infanticide under the Infanticide Act, 1949. By sparing the defendant from the anxiety of having a trial for murder pending and from the anguish of appearing in court on a murder charge, it would give expression to the foundation of humanity on which the defence is based. Only cases where the medical evidence was contested by the prosecution would be tried as murder. Thus valuable court time and expense would be saved as judges would no longer have to hear protracted medical testimony on the issue of diminished responsibility before deciding whether or not to accept the plea or to leave it for jury determination.

3.9 SENTENCING OF DIMINISHED RESPONSIBILITY MURDERERS

Any genuine commitment on the Government's part to introducing the diminished responsibility defence into Irish Law must be accompanied by an equal commitment to providing the resources that are needed to deal with a diminished responsibility population. In 1992 Dr. Charles Smith, director of the Central Mental Hospital in Dundrum, told a conference of the Royal College of Psychiatrists, of a waiting list at Dundrum which prisoners with psychiatric illness had to join and of a widespread belief that, within the local prison system, levels of illness were higher

¹¹²¹ ibid

¹¹²² ibid

than ever before¹¹²³. This suggests an insufficient number of beds at Dundrum and that without a commitment to providing adequate psychiatric facilities, defendants convicted of diminished responsibility manslaughter will end up in already overcrowded prisons (the only alternative) which provide less than adequate psychiatric care¹¹²⁴. A report in the Irish Medical News in 1993 revealed that over 100 Irish prisoners suffering from mental illness are not receiving proper treatment¹¹²⁵. Diminished responsibility murderers, by virtue of having their condition diagnosed before sentence (unlike many sentenced prisoners whose illness goes undiagnosed¹¹²⁶) are therefore, likely to swell the waiting list at Dundrum, adding to the delay in receiving treatment.

Dell and Smith's survey of men convicted of section 2 manslaughter between 1966 and 1977, illustrates the pitfalls into which a well meaning but short-sighted government may fall¹¹²⁷. While in the late sixties two thirds went to hospital and one third to prison, by the end of the seventies the reverse was occurring¹¹²⁸. In the nineties a large proportion of diminished responsibility murderers are still sent to prison¹¹²⁹ - in 1992 42.5% of men convicted of section 2 manslaughter received prison sentences, while 47.5% went to hospital¹¹³⁰. Viewing 1990, 1991 and 1992 together, prison sentences have given to 40% of section 2 men compared with hospitals orders which have been given to only 52%¹¹³¹.

¹¹²³ P.O'Morain "Prisoners with Mental Illness Join Waiting List" *Irish Times* 27 Jul.1992

¹¹²⁴ See for eg.the discussion of Mountjoy jail by V.Browne "Hundreds of Citizens Sentenced to Squalor" *Irish Times* 7 Jun.1995

¹¹²⁵ *Irish Times* 28 Jun.1993

¹¹²⁶ V.Browne "Prisoners Degraded Instead of Helped at Mountjoy" *Irish Times* 14 Jun 1995 says that it is not known to what extent there are several prisoners in Mountjoy at any given time who are gravely mentally ill

¹¹²⁷ S.Dell and A.Smith "Changes in the Sentencing of Diminished Responsibility Homicides" (1983) 142 Br.J.Psychiat.20

¹¹²⁸ ibid

¹¹²⁹ P.Fennell "Diversion of Mentally Disordered Offenders from Custody" [1991] Crim.L.R.333 p.335 has stated that the changes in definitions and criteria of mental disorder relevant to detention under the Mental Health Act 1983 have not led to a fall in the number of patients described as mentally disordered and detainable under mental health legislation.

¹¹³⁰ Criminal Statistics, 1992, Table 4.9

¹¹³¹ ibid

By 1974, the English Government's lack of foresight lead the Butler Committee to express astonishment and shock at the overcrowding in the special hospitals, especially at Broadmoor¹¹³². Against this background of serious overcrowding, the Department of Health and Social Security (D.H.S.S.) was insisting that the special hospitals should admit only patients needing maximum security¹¹³³. Previously it had been the settled practice to accept into these hospitals every offender who the courts wished to send¹¹³⁴. Eventually prison doctors did not wait to be refused special hospital beds but stopped asking for them¹¹³⁵ and once the doctors stopped making recommendations, the judges had to stop making orders¹¹³⁶.

Until 1959, most National Health Service (N.H.S.) mental hospitals had locked wards and offender patients who were a problem of management and needed some degree of security were easily accommodated¹¹³⁷. The nursing and medical staff had a long tradition of caring for them and had acquired considerable skill, and they found few patients too violent, threatening, or dangerous to cope with¹¹³⁸. However by the 1970's, the N.H.S. hospitals were refusing to accept a number of mentally disordered offenders on various grounds, including the one that the patients, whilst not so dangerous as to require special hospitals, were too difficult or dangerous to be managed in a modern psychiatric hospital, with its emphasis on informality and freedom for the patient¹¹³⁹. Dell found that the less secure N.H.S. hospitals were not asked to take her sample of diminished responsibility offenders by the prison medical officers¹¹⁴⁰ due to their increased reluctance to accept offenders on hospital orders¹¹⁴¹

¹¹³² Interim Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 5698 (London, 1974) para.4

¹¹³³ S.Dell *Murder into Manslaughter* op cit p.28

¹¹³⁴ ibid

¹¹³⁵ S.Dell and A.Smith "Changes in the Sentencing of Diminished Responsibility Homicides" op cit p.30

¹¹³⁶ ibid p.33

¹¹³⁷ R.Buglass "Regional Secure Units and Interim Security for Psychiatric Patients" (1978) B.M.J.489 p.489

¹¹³⁸ ibid

¹¹³⁹ M.Faulk "Mentally Disordered in an Interim Regional Medium Secure Unit" [1979] Crim.L.R.686 p.686

¹¹⁴⁰ S.Dell and A.Smith "Changes in the Sentencing of Diminished Responsibility Homicides" op cit p.30

¹¹⁴¹ S.Dell *Murder into Manslaughter* op cit p.18

and to a possible reluctance on the part of reporting doctors to place section 2 offenders in open hospitals with no security at all¹¹⁴².

As a result of the lack of secure facilities for section 2 murderers, prison doctors came increasingly to rely on the one institution that could not refuse these offenders: prison¹¹⁴³. This was accompanied by a growth in "non-hospital treatment thinking" among the reporting psychiatrists¹¹⁴⁴. Dell's analysis showed an 18% increase in the number of court reports between 1966 and 1977 that referred to the availability of the transfer procedure from prison to mental hospital under section 72 of the Mental Health Act, 1959¹¹⁴⁵ notwithstanding the Court of Appeal's judgment in Morris¹¹⁴⁶. There the Court held that although the judge's discretion to make a hospital order under section 60 of the 1959 Act was "very wide indeed", the basic principle must be that, where punishment as such was not intended but the sole object of the sentence was that the prisoner should receive mental treatment until he can safely be discharged, a proper exercise of that discretion demanded that steps should be taken to exercise the powers under section 60 to make a hospital order and that the matter should not be left to be dealt with by the Secretary of State under section 72.

By 1980 only 11% of Dell's sample of life sentence section 2 offenders had been transferred to Broadmoor under section 72 and only 63% had received hospital treatment within the prison system¹¹⁴⁷. None of the men with determinate sentences had been transferred and only 21% were recorded as having any kind of psychiatric treatment in prison¹¹⁴⁸. The Home Secretary can only move a prisoner to a special hospital under section 72 if the D.H.S.S. is prepared to make a place available¹¹⁴⁹. Because of overcrowding, such places were not available during Dell's research period

¹¹⁴² ibid

¹¹⁴³ ibid p.52

¹¹⁴⁴ ibid p.21

¹¹⁴⁵ ibid

¹¹⁴⁶ [1961] Crim.L.R.481

¹¹⁴⁷ S.Dell *Murder into Manslaughter* op cit p.44

¹¹⁴⁸ ibid

¹¹⁴⁹ ibid

for five men for whom they were sought¹¹⁵⁰. Two had clearly been sentenced with the possibility of a section 72 transfer in the judge's mind¹¹⁵¹.

Dell's case studies reveal the injustice which can result from inadequate funding of the mental health services. In the first case the prison medical officer's court report for the trial said:

"He suffers from inherited, periodic manic depressive insanity, and was so suffering at the material time..he does not at present need hospital treatment but might again develop an episode of further insanity..Should he receive a prison sentence, his transfer to hospital (could) be speedily effected"¹¹⁵².

This man became psychotic again almost immediately after he was sentenced to life imprisonment in 1976 but despite five years' attempts on the part of the prison authorities to obtain him a special hospital place under section 72, he was still in prison by the time data collection ceased in 1980¹¹⁵³. The other man who had been sentenced with the possibility of section 72 in mind, was suffering from a paranoid psychosis¹¹⁵⁴. At his trial the prison medical officer had given evidence that a life sentence with a view to section 72 was an appropriate disposal and the judge in sentencing him to life imprisonment had said:

"Such psychiatric assistance as you may need can be given to you by action of the Secretary of State under s72"¹¹⁵⁵.

However, two years after the doctors had completed the section 72 papers, his transfer had still not been effected¹¹⁵⁶.

¹¹⁵⁰ ibid

¹¹⁵¹ ibid

¹¹⁵² ibid

¹¹⁵³ ibid

¹¹⁵⁴ ibid

¹¹⁵⁵ ibid p.45

¹¹⁵⁶ ibid

Perhaps a significant reason for the decline in special hospital recommendations by prison medical officers and the increased resort to imprisonment, was the change in professional opinion about the treatability of psychopaths¹¹⁵⁷, a description given by prison medical officers to 42% of Dell's subjects.¹¹⁵⁸. However, this was not the only group which received more sentences of imprisonment. Increased sentencing also occurred amongst the schizophrenics, although to a lesser extent¹¹⁵⁹. Of particular concern, was Dell's discovery of the increasing tendency over the years for mentally ill offenders with a diagnosis of depression to be described in court reports as recovered and no longer needing treatment¹¹⁶⁰. By the mid-seventies 30% of men with a diagnosis of depression were described as recovered by the time of trial¹¹⁶¹ compared with 3% in the late sixties¹¹⁶². This she attributes to the fact that over the years it took longer to process the offenders through the courts (2.9 months on average in the late sixties; 4.9 months by the mid-seventies) and the longer people are held, the more opportunity there is for treatment and natural remission to take effect¹¹⁶³. She also thinks it likely that at least some of the increase in the proportion of men described as recovered is connected with the reporting doctors' changed attitudes to the making of hospital recommendations¹¹⁶⁴. The effect was that, unlike mentally ill people described as improved or unchanged, this group ceased to be eligible for hospital orders; nearly all of them (13/15) were given prison sentences¹¹⁶⁵. The anomaly is that a diminished responsibility offender who is still mentally ill at the time of his trial will almost without exception be made subject to a hospital order if that is the unanimous recommendation of the examining doctors and when discharged, everything possible will be done to assist him towards rehabilitation into the community¹¹⁶⁶. However, a person who has committed exactly the same sort of

¹¹⁵⁷ ibid p.19

¹¹⁵⁸ ibid p.37

¹¹⁵⁹ ibid p.14

¹¹⁶⁰ ibid p.21

¹¹⁶¹ ibid p.22

¹¹⁶² ibid p.72

¹¹⁶³ ibid

¹¹⁶⁴ ibid p.23

¹¹⁶⁵ S.Dell and A.Smith "Changes in the Sentencing of Diminished Responsibility Homicides" op cit

p.32

¹¹⁶⁶ S.Dell *Murder into Manslaughter* op cit p.42

offence while suffering from exactly the same illness but who recovers before his trial (perhaps only because he had to wait longer for it) will be sentenced to imprisonment¹¹⁶⁷. It cannot be argued that he is more blameworthy or responsible than his counterpart who was hospitalised; the only difference between them is that one showed more improvement before his trial than the other¹¹⁶⁸.

The length of a section 2 offender's detention may also hinge on the prison/hospital distinction as is evident from Dell's survey of restricted hospital patients and life sentence prisoners, both convicted under section 2, both subject to indefinite detention¹¹⁶⁹. Despite considerable diagnostic overlap in the population of both groups¹¹⁷⁰ the special hospital patients were released much quicker than their prison counterparts¹¹⁷¹. Even more alarming is Grounds' survey of prisoners transferred to Broadmoor between 1960 and 1983 (not limited to diminished responsibility offenders) which has revealed a trend in transfer occurring at a progressively later stage of sentence which led in turn to later discharge, relative to the expiry of sentence¹¹⁷².

The Butler Committee's proposed solution was the creation of secure hospital units in each regional health authority area, to fill the "yawning gap" between the high security special hospitals and the N.H.S. hospitals with no security at all¹¹⁷³. Their belief was that the units were crucial to the greater flexibility in placement that was needed for mentally abnormal offenders and to the early relief of the prisons and the special hospitals¹¹⁷⁴. They proposed that the necessary degree of security be achieved partly, by a high ratio of staff to patients, partly by the regime and partly by the design

¹¹⁶⁷ ibid

¹¹⁶⁸ ibid

¹¹⁶⁹ S.Dell The Detention of Diminished Responsibility Homicide Offenders (1983) 23

Brit.J.Criminol.50

¹¹⁷⁰ ibid p.55

¹¹⁷¹ ibid p.54

¹¹⁷² A.Grounds "Transfer of Sentenced Prisoners to Hospital" [1990] Crim.L.R.544 p.547

¹¹⁷³ Interim Report of the (Butler) Committee on Mentally Abnormal Offenders Cmnd 5698 op cit

para.5

¹¹⁷⁴ ibid para.9

and physical characteristics of the buildings¹¹⁷⁵. Aggressive psychopaths were excluded from these recommendations¹¹⁷⁶.

Despite the Government's acceptance of these proposals¹¹⁷⁷, the provision of medium secure units has been tardy. 15 years later only 600 of the 2,000 beds recommended by Butler had been provided¹¹⁷⁸. This may account for the continued underuse of the hospital order. The main causes of the delay in providing medium secure units appear to be inadequate funding of the mental health services and misunderstanding about the purpose of regional secure units¹¹⁷⁹. Bluglass has found that little emphasis has been given to developing the units as part of a comprehensive service including special hospitals, N.H.S. hospitals, secure units and a forensic service in the community as recommended by Butler, and that there has been an evident lack of cooperation between mental health professionals¹¹⁸⁰.

In 1978 the Henchy Committee followed its proposal to introduce the defence of diminished responsibility into Irish law with the recommendation that a court should be able to order that a particular person should be detained in such a "designated unit" as is best calculated to meet his situation¹¹⁸¹. They did not propose that the Government should build these units, but that the Minister of Health should be empowered to designate any psychiatric centre to be a designated centre¹¹⁸². The Committee envisaged a flexible system of transfers between units including the Central Mental Hospital¹¹⁸³.

The Henchy Committee's recommendation on disposal was short-sighted in the extreme, in its failure to provide for an increased number of secure hospital places. There may have been an adequate number in 1978 but there certainly is not now.

¹¹⁷⁵ ibid para.12

¹¹⁷⁶ ibid

¹¹⁷⁷ R.Bluglass op cit p.490

¹¹⁷⁸ Lord Longford *Prisoner or Patient* (London, 1992) p.15

¹¹⁷⁹ See R.Bluglass op cit

¹¹⁸⁰ ibid p.491

¹¹⁸¹ Third Interim Report of the InterDepartmental Committee on Mentally Ill and Maladjusted Persons Prl.(8275) op cit para.13

¹¹⁸² ibid

¹¹⁸³ ibid

Their perfunctory dealing of the subject never touched on the issue of security. A logical question which requires answering is whether the ordinary psychiatric hospitals would be willing to house diminished responsibility murderers. Given the present reluctance of ordinary psychiatric hospitals to admit patients on transfer from Dundrum¹¹⁸⁴, Henchy's recommendations that the psychiatric hospitals should, in appropriate cases, take patients directly following sentence would do nothing to improve the present position. If anything it would exacerbate it.

The Henchy Committee's report, like Butler's, came after the findings of a 1976 survey on the need for psychiatric facilities in the Oxford region. This survey found that there were more mentally subnormal or borderline subnormal offenders than mentally ill offenders misplaced in prison or the community and recommended that two types of unit were likely to be needed, one for the mentally ill and a second, separate unit for the mentally subnormal¹¹⁸⁵. Bluglass identified a deficiency in Butler's recommendations arising from patients in need of long-term care¹¹⁸⁶. Designated centres close to family and friends would, admittedly, provide support for those patients in need of long-term treatment and care. However, the Irish Government must accompany the introduction of diminished responsibility with a massive injection of finance into high and medium security hospitalisation to deal with those diminished responsibility murderers who need these conditions. Whilst the building of medium security hospitals may not be viable given Ireland's small population, greater security should be provided in designated psychiatric hospitals for diminished responsibility murderers, coupled with a higher staff: patient ratio. Only with increased funding will the reluctance of ordinary psychiatric hospitals to accept patients from Dundrum be relieved.

But the Irish Government's financial commitment must not end here. Ashworth and Gostin have opined that "the task of dealing with mentally disordered offenders should be approached on the basis that the law should facilitate treatment where it is possible and available, but that in general a person should not be deprived

¹¹⁸⁴ F.McAuley op cit p.128

¹¹⁸⁵ M.Faulk op cit pp.689 & 670

¹¹⁸⁶ R.Bluglass op cit p.491

of his liberty unless that is essential and, if the court does form that view, he should not be deprived of his liberty for a period longer than is necessary"¹¹⁸⁷. This guideline shows that the Government must also commit resources to funding the probation service if an Irish diminished responsibility defence is to prove satisfactory. Due to delays in bringing cases to trial, during which the effects of treatment and natural remission can take effect, some diminished responsibility murderers may no longer require treatment. Others may require psychiatric assistance but their disorder may not be of a degree that warrants their hospitalisation. Probation with a condition of psychiatric treatment and conditional discharge may therefore be necessary to prevent an Irish diminished responsibility defence from being in breach of Article 40.4.1 of the Irish Constitution and Article 5(1)(e) of the European Convention on Human Rights, and for the satisfactory operation of the defence.

3.10 CONCLUSION

In an endeavour to break from the grip of English precedent following independence, the Irish courts have chosen to concentrate on improving the wording of the Irish insanity defence, rather than adopt a defence of diminished responsibility. The Irish control test created in Doyle, underscores the impossibility of devising a satisfactory formulation of the insanity defence. The deficiencies of this test lie in its preservation of the McNaghten Rules in cases of delusion and in its broad application in other examples of insanity. The effect of its broadness is exacerbated by unsatisfactory procedures surrounding the law on insanity in Ireland, such as the obligation on the prosecution to raise insanity where the evidence suggests it, despite unwillingness on the part of the defence, and the impossibility of challenging a finding of guilty but insane. Coupled with the practice of mandatory indefinite committal, the Irish insanity defence infringes the constitutional right to liberty under the Irish Constitution and a possible unenumerated guarantee against cruel and unusual punishment. Furthermore, the decision in Doyle, which is a paragon of

¹¹⁸⁷ A.Ashworth and L.Gostin "Mentally Disordered Offenders and the Sentencing process" [1984] Crim.L.R.195 p.207

judicial legislation, infringes the separation of powers guarantee in the Irish Constitution. There is also evidence that the Irish insanity defence is in breach of the European Convention, both in its definition of the degree of mental illness which warrants compulsory hospitalisation and the unsatisfactory procedure for release of those found insane.

The Irish control test confirms that reformulating the insanity defence will always be surrounded by controversy. Aware of this, a movement in favour of an Irish diminished responsibility defence has been slowly gathering momentum since the late 1970's. This movement, now at its zenith, has been vividly illustrated by calls from the Judiciary, academic commentators and politicians for its introduction into Irish law and by the protest of a Limerick jury at its lack of availability in a recent murder trial.

An Irish defence of diminished responsibility which focuses on the particular abnormality of the defendant will enable juries to give expression to their true feelings about a defendant's culpability and thus enable judges to give a disposal most likely to meet a defendant's needs. By examining whether the defendant was less responsible, it will dispense with the need to look at responsibility as an all or nothing concept, the source of much of the controversy surrounding the insanity defence. By giving recognition to the psychiatric viewpoint of mental illness it will resolve the medico/legal tension underpinning the polemic over the insanity defence. Finally, the defence will remedy several defects in the law on infanticide.

When introducing diminished responsibility into Irish law, the Irish Legislature should use clear, straightforward language in formulating the defence. This will be a significant improvement on its English counterpart. Its terms should allow the psychiatric profession a wide berth when testifying as to diminished responsibility. Not only should the requirement of mental disorder give recognition to the psychiatric viewpoint but the issue of impaired responsibility should be framed so as to enable psychiatric testimony on this issue. Undoubtedly, it is the failure of the English Legislature to differentiate the roles of jury and expert witness which has

contributed to the evolution of a successful partnership between legal and medical professions in the working of the diminished responsibility defence.

A defence of diminished responsibility in Ireland cannot operate successfully without the provision of suitable psychiatric assistance for those diminished responsibility murderers who will benefit from it. This will require a considerable financial commitment on the Government's part to providing the requisite facilities. A valuable lesson can be learned from the English Government's failure to provide financially for these facilities. Placing the burden of proof on the prosecution and allowing the prosecution to charge diminished responsibility manslaughter will give expression to the foundation of humanity on which the defence is built. It is hoped that the Irish Legislature will commit themselves whole-heartedly to providing this defence and will finally put paid to what has been described as "the abrogation of responsibility by the Oireachtas to reform, or in this case even to form, the law"¹¹⁸⁸.

¹¹⁸⁸ P.Charleton op cit p.171

OVERVIEW

The recent announcement by the Irish Minister for Justice that a Criminal Law (Insanity) Bill is at "an advanced stage of preparation" may signal the convergence of Irish and English law on the issue of diminished responsibility.

This thesis has shown that the introduction of diminished responsibility will be the most satisfactory solution to the Herculean challenge posed by reformulation of the insanity defence. This is exemplified by the English defence of diminished responsibility which has resolved the controversy over where the boundary between responsibility and irresponsibility should be drawn and over which of the legal or medical professions should have the final say in drawing this line.

This conflict has been at the heart of the controversy surrounding the McNaughten Rules since the time of their inception. By tracing the proposals to introduce irresistible impulse (both in England and in Ireland), a product test (in the United States) and a justly responsible test (in England and the United States) I have shown the impossibility of satisfactorily reformulating the insanity defence. This has been reinforced by the fate of the American Law Institute's test, the Butler Committee's proposed test and the abolitionists' proposal, each of which has attracted a wealth of criticism.

It was the introduction of diminished responsibility into English law which proved to be the solution to the polemic. Although admitted as a fob to ward off the proponents advocating abolition of the death penalty, the English defence has done much more than spare undeserving murderers from a conviction of murder. It has provided legal recognition to irresistible impulses which were the forum for over 100 years' conflict between law and medicine over the insanity defence. The admission of the irresistible impulse as a species of diminished responsibility marked the beginning of a happy partnership between law and medicine in the working of the diminished responsibility defence. Evidence of this partnership can be seen in the willingness of the courts to listen to medical testimony on various mental abnormalities for the

purpose of a diminished responsibility defence, thus legitimising the medical view of mental disorder. It is also evident in the willingness of the courts to listen to medical testimony on the issue of substantially impaired mental responsibility. The partnership is revealed in the Crown's practice of accepting the plea where the medical evidence of diminished responsibility is unanimous and the ruling of the Court of Appeal requiring that in these cases the case should not go to trial, in the absence of outside evidence indicating normality. A paradigmatic example of the working of this partnership is in the law's insistence on medical testimony, thus according special status to the medical profession in the operation of the defence, while at the same time retaining its right to try diminished responsibility cases, despite unanimous evidence of mental abnormality, in appropriate cases.

The diminished responsibility defence has stepped in to save mentally abnormal killers from a murder conviction where the defences of provocation or automatism would have failed them. It has also saved mentally abnormal murderers from an inappropriate finding of insanity with consequent mandatory indefinite hospitalisation.

Despite initial reluctance to entertain the possibility of a diminished responsibility defence in Ireland following independence from England's rule, the defence now has considerable support in Ireland. The most impressive examples of support are the entreaties to the Legislature by the Irish Judiciary and the objection of a Limerick jury to the inapplicability of the defence in Irish law. Frustration is considerable at the Legislature's inertia in the field of criminal insanity. It is hoped, therefore, that this year's promise of Legislative action will be a genuine one.

Apart from the defence's following, there are several factors which militate in favour of an Irish diminished responsibility defence. These are, the unsatisfactory test of insanity in Irish law and the impossibility of devising a controversy-free formulation of the insanity defence. The discomfort about the Irish insanity defence stems from its wide application coupled with the inflexible disposal which follows it, its infringement of the right to liberty under the Irish Constitution in addition to the

separation of powers guarantee, and a possible guarantee against cruel and unusual punishment. The Irish insanity defence is also in breach of Articles 5(1)(e) and 5(4) of the European Convention on Human Rights.

A diminished responsibility defence with its premise of partial responsibility would solve the heartburnings likely to accompany any attempt to reformulate the insanity defence because of its foundation on a rigid distinction between responsibility and irresponsibility. This has traditionally resulted in offenders judged insane by medical or contemporary standards, being held sane and responsible. Diminished responsibility would provide a satisfactory medium for dealing with the mentally abnormal murderer, and in doing so would recognise the medical view of insanity, leading to a resolution of the medico-legal tension underpinning much of the controversy surrounding the insanity defence. The recognition of partial responsibility would, of course, enable the courts to focus more accurately on the defendant's degree of guilt and would facilitate a disposition best calculated to reflect his culpability and to meet his needs.

It is to be hoped therefore, that the Irish Legislature will understand the need to legitimise the medical view of insanity in order to effect a resolution of the controversy. For this to be achieved, medical testimony should be a practical necessity. Coupled with a clear statement of the defence's limits this will spare the courts from the necessity of delineating the boundary of an Irish diminished responsibility defence. Defining the defence in terms which allow the psychiatric profession to pronounce on the issue of impaired responsibility will recognise the difficulty of the jury's task and lead to the evolution of a happy partnership between law and medicine. In order to give effect to the spirit of humanity which underlies the defence, the Legislature should place the burden of proof on the prosecution, allow charges of diminished responsibility manslaughter and accompany the introduction of the legislation with a corresponding commitment to providing the resources needed to deal with a diminished responsibility manslaughter population.

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