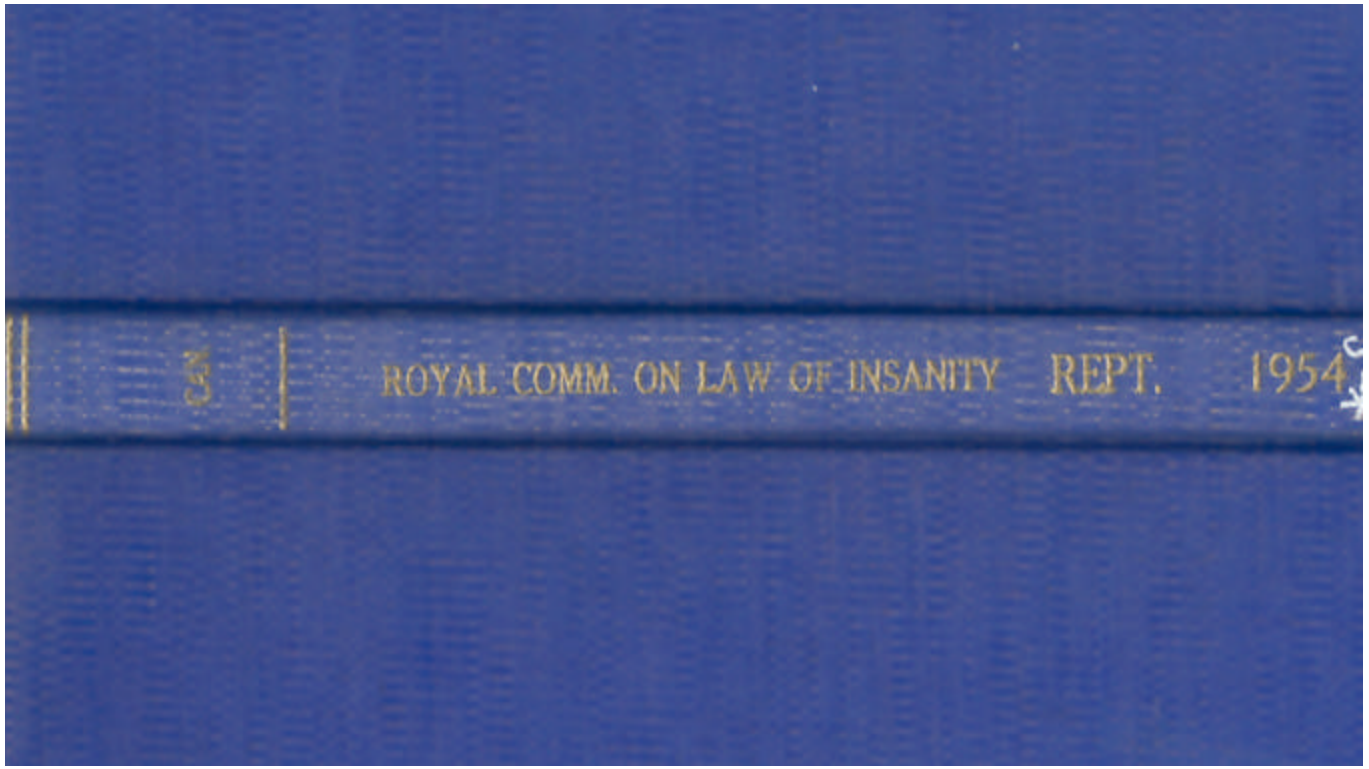
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ROYAL COMM. ON LAW OF INSANITY REPT. 1954

REPORT

of the

ROYAL COMMISSION

on

THE LAW OF INSANITY

AS A DEFENCE IN CRIMINAL CASES

HULL
EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY

ROYAL COMMISSION ON THE LAW OF INSANITY AS A DEFENCE IN CRIMINAL CASES

THE HONOURABLE J. C. McRUER, LL.D., Chairman,
Chief Justice of the High Court for Ontario.

GUSTAVE DESROCHERS, M.D., F.R.C.P. (Can.), Vice-Chairman,
Assistant Medical Superintendent,
Hôpital St.-Michel Archange, Québec, P.Q.

HER HONOUR JUDGE HELEN KINNEAR, LL.D.,
Judge of the County Court of the County of Haldimand.

ROBERT O. JONES, B.SC., M.D., C.M., F.A.P.A.,
Professor of Psychiatry, Dalhousie University.

JOSEPH HARRIS, ESQ., LL.D.,
President, Great-West Life Assurance Company,
Vice-President, The Canadian Bank of Commerce.

JAMES WORRALL, B.SC.,
Counsel.

EDOUARD MARTEL, ESQ.,
Associate Counsel.

R. NOEL DICKSON, ESQ.,
Secretary.

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TERMS OF REFERENCE AND APPOINTMENT OF PERSONNEL

P.C. 1954-289

Certified to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 2nd March, 1954.

The Committee of the Privy Council have had before them a report dated 1st March, 1954, from the Minister of Justice, representing:—

That on Monday, the 2nd day of February, 1953, there was referred by the House of Commons to a Special Committee of that House, Bill No. 93, intituled "An Act Respecting the Criminal Law", being a Bill to revise and consolidate the criminal law of Canada;

That the said Special Committee, in its third and final report, dated the 1st day of May, 1953, reported that

> "The Committee upon the material before it was not prepared to recommend a change in the present law respecting the defence of insanity, lotteries and the imposition of punishment by whipping and by sentence of death, but unanimously has come to the conclusion, and so recommends, that the Governor General in Council give consideration to the appointment of a Royal Commission, or to the submission to Parliament of a proposal to set up a Joint Parliamentary Committee of the Senate and the House of Commons, which said Royal Commission or Joint Parliamentary Committee shall consider further and report upon the substance and principles of these provisions of the law aforesaid, and shall recommend whether any of those provisions should be amended and, if so, shall recommend the nature of the amendments to be made";

That at the present session of Parliament a Joint Committee of both Houses of Parliament has been appointed to inquire into and report upon the questions whether the criminal law of Canada relating to (a) capital punishment, (b) corporal punishment or (c) lotteries, should be amended in any respect and, if so, in what manner and to what extent;

That, in the opinion of the Minister, it is expedient that inquiry be made into the question whether the criminal law of Canada relating to the defence of insanity should be amended in any respect and, if so, in what manner and to what extent.

The Committee, therefore, on the recommendation of the Minister of Justice, advise that,

(1) A Commission do issue, pursuant to Part I of the Inquiries Act, appointing

The Honourable James Chalmers McRuer,
Chief Justice of the High Court of
Justice of Ontario,

Doctor Gustave Desrochers,
Assistant Superintendent of St. Michel
Hospital at the City of Quebec,

Her Honour Judge Helen Kinnear,
County Court Judge for the County of
Haldimand, Ontario,

Doctor Robert O. Jones,
Professor of Psychiatry at Dalhousie
University, Halifax, Nova Scotia, and

Joseph Harris, Esquire,
of Winnipeg, Manitoba,

as Commissioners to inquire into and report upon the question whether the criminal law of Canada relating to the defence of insanity should be amended in any respect and, if so, in what manner and to what extent;

(2) the said Commissioners be authorized to adopt such procedure and method as they may deem expedient for the conduct of the inquiry and to alter or change the same from time to time;

(3) the said Commissioners be authorized to engage the services of such counsel and of such technical advisers, experts, clerks, reporters and assistants as they may deem necessary and advisable;

(4) the said Commissioners be paid their actual living expenses while absent from their places of residence in connection with the inquiry, for which detailed expense accounts are to be submitted;

(5) the said Commissioners be paid their actual out of pocket transportation expenses when travelling for the purposes of the inquiry, for which detailed expense accounts are to be submitted; and

(6) the expenses of and incidental to the said inquiry be paid out of money appropriated by Parliament.

R. B. Bryce,
Clerk of the Privy Council.

REPORT

OTTAWA, October 25, 1956.

The Honourable STUART SINCLAIR GARSON, Q.C.,
Minister of Justice, Ottawa.

SIR, We have the honour to present you with the Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases.

INTRODUCTION

Procedure.

We held public meetings in all the capital cities of the provinces of Canada and in the cities of Ottawa, Montreal and Vancouver. Prior to the public meetings advertisements were published in the leading daily newspapers of all provinces stating the purpose of the Commission, the dates and times of the sittings, and inviting representations from any interested persons or organizations. In addition to this, the organized bodies of the legal and medical professions of Canada were invited to make representations expressing their views on the subject of reference, either at the sittings of the Commission or in writing by communicating with the Secretary. Appendix I is a list of the organizations invited to make representations. Appendix II is a list of the organizations from which representations were received. In addition to this, Chief Justices in all the provinces were invited to have the members of their courts most experienced in the administration of the criminal law assist the Commission by expressing their views on the subject under inquiry. Generous response to this invitation was made by the judiciary throughout Canada. The views of the members of the judiciary were heard by the Commission sitting in camera or by written communication. The invitation to organized bodies of the medical and legal professions as well as to persons in public and private office met with the same generous response, and we are indebted to all those who contributed to the discussions before us.

We consider it convenient to discuss the subject of criminal responsibility as it is related to disease of the mind or mental deficiency under four main heads applicable to the procedural stages at which the law must be applied, viz.:

(a) remand for examination before committal for trial;

(b) on arraignment;

(c) as a defence under the plea of not guilty;

(d) commutation of the death sentence and the exercise of the royal prerogative of mercy.

We consider it most convenient to discuss the law and practice with respect to the commutation of the death sentence and the exercise of the royal prerogative of mercy before substantive law or procedure, because in our view neither the law nor the procedure can properly be considered without a complete knowledge of the procedure in Canada where the death penalty has been imposed.

CHAPTER I

COMMUTATION OF DEATH SENTENCE AND THE ROYAL PREROGATIVE OF MERCY

The express provisions of the Criminal Code with respect to commutation of the death sentence are as follows:

> 656. (1) The Governor in Council may commute a sentence of death to imprisonment in the penitentiary for life, or for any term of years not less than two years, or to imprisonment in a prison other than a penitentiary for a period of less than two years.
>
> (2) A copy of an instrument duly certified by the Clerk of the Privy Council or a writing under the hand of the Minister of Justice or Deputy Minister of Justice declaring that a sentence of death is commuted is sufficient notice to and authority for all persons having control over the prisoner to do all things necessary to give effect to the commutation.
>
> 658. Nothing in this Act in any manner limits or affects Her Majesty's royal prerogative of mercy.

We propose to deal with the exercise of the right of the royal prerogative of mercy and commutation only in so far as they apply to capital cases.

A discussion of this subject cannot be dissociated from other statutory rights of a convicted person in Canada.

Every person convicted of an indictable offence has a right to appeal to the court of appeal of the province against his conviction

(a) on any ground that involves a question of law;

(b) on any ground that involves a question of fact alone or a question of mixed law and fact, with leave of the court of appeal, or upon certificate of the trial judge that the case is a proper case for appeal;[1]

(c) on any other ground of appeal that appears to the court of appeal to be sufficient ground of appeal, with leave of the court of appeal.

A person who is convicted of an indictable offence whose conviction is affirmed by the court of appeal may appeal to the Supreme Court of Canada

(a) on any question of law on which a judge of the court of appeal dissents, or

(b) on any question of law, if leave to appeal is granted by the Supreme Court of Canada. For the purposes of granting leave, a quorum is formed by five judges in capital cases and by three judges in all other cases.[2]

The court of appeal may quash a sentence and order the appellant to be kept in safe custody to await the pleasure of the Lieutenant-Governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct.[3]

Procedure following conviction in capital cases.

Within two weeks following a verdict of guilty in a capital case, the trial judge is required to send to the Minister of Justice a report containing a substantial summary of the salient facts of the case, together with any remarks or recommendations he may wish to make with reference to the exercise of executive clemency.[4]

A complete transcript of the evidence, and the trial judge's charge to the jury, are transmitted as early as possible to the Minister.

[1] Criminal Code, s. 592.
[2] Criminal Code, s. 597, and The Supreme Court Act, R.S.C. 1952, c. 259, as amended in 1956.
[3] Criminal Code, s. 592(d).
[4] Criminal Code, s. 643.

Preparations are made for consideration of commutation of sentence notwithstanding the fact that an appeal is proceeding. In the instructions to trial judges issued by the Department of Justice

> The trial judge, when making his report, is invited to give his personal detailed observations regarding medical testimony or any insanity issue and concerning the prisoner himself.

While the prisoner is in custody awaiting execution the Justice Department obtains a report from the sheriff or the keeper of the prison in which he is confined; this report includes a statement of the prison physician with respect to the mental and physical condition of the condemned person. If the prisoner is in custody for any substantial period of time, reports are received periodically.

The full information available is reviewed in the Department of Justice and a report is made to the Governor General in Council. If there is any question as to the prisoner's mental condition, the Minister appoints at least one competent psychiatrist to examine the evidence and the prisoner.

The Honourable Mr. Garson, Minister of Justice for Canada, appeared before the Commission and gave a detailed statement showing the pains that are now taken with reference to these examinations. He stated:

> The point that I wish to make here is that no detail is ever considered to be too trivial, where the life of a condemned person is concerned, to merit the most comprehensive inquiry and investigation.

Where the evidence with reference to the mental condition of the prisoner has been conflicting, the Minister stated:

> . . . we weigh the evidence as carefully as we can and then we seek independent psychiatric experts to assist us in deciding the conflicts in the evidence before us.

When the psychiatrist has had an opportunity to consider all of the circumstances involved, a meeting is held with the Minister and departmental officials — if necessary, a series of meetings — to review the case. The Minister then, after the most serious consideration of all the factors involved, and assisted by the psychiatrist's reports and advice, arrives at a decision and takes his recommendation to his colleagues in the Cabinet. Here again the whole question is thoroughly reviewed in the light of the collective experience of all the members of the Cabinet and the final decision is reached whether commutation should be granted or not.

The Minister emphasized that in practice all available sources of information are drawn upon before a decision is arrived at. When executive clemency is being considered there may be much evidence available for consideration that could not be presented in court under the rules of evidence governing courts in Canada.

The Minister stated that there are not and there cannot be precise rules laid down for the purpose of determining, in any given case, whether or not there should be commutation of a sentence of death to one of life imprisonment or lesser punishment.

We agree with the statement quoted by the Minister, first made in the House of Commons in Great Britain on April 11, 1907, by Mr. Herbert Gladstone, and quoted by Sir David Maxwell Fyfe (now Lord Kilmuir), showing a continuity of policy:

> It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations—the motive, the degree of premeditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others—have to be taken into account in every case; and the decision depends on a full review of a complex combination of circumstances, and often on the careful balancing of conflicting considerations.
>
> As Sir William Harcourt said in this House, "The exercise of the prerogative of mercy does not depend on principles of strict law or justice, still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and in my

opinion a capital execution which in its circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime is a great evil."

There are, it is true, important principles which I and my advisers have constantly to bear in mind; but an attempt to reduce these principles to formulae and to exclude all considerations which are incapable of being formulated in precise terms, would not, I believe, aid any Home Secretary in the difficult questions which he has to decide.

The Minister stated:

But if there appears to have been, nevertheless, a degree of abnormality sufficient to affect materially the control of his conduct, especially when he was under great mental stress or emotional strain, the tendency, depending of course upon the facts of the case under review, would be to exercise clemency by way of commutation.

We are in agreement that the statutory provision for the commutation of the death sentence and exercise of the royal prerogative of mercy are very essential parts of the administration of justice in Canada, but we shall hereafter make recommendations for more formal provision in the law about psychiatric inquiry of the nature now conducted.

CHAPTER II

REMAND FOR EXAMINATION BEFORE COMMITTAL FOR TRIAL

This is governed by the provisions of section 451 of the Criminal Code, which reads as follows:

> 451. A justice acting under this Part may . . .
>
> (c) remand an accused,
>
> (i) by order in writing, to such custody as the justice directs for observation for a period not exceeding thirty days where, in his opinion, supported by the evidence of at least one duly qualified medical practitioner, there is reason to believe that
>
> (A) the accused is mentally ill, or
>
> (B) the balance of the mind of the accused is disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child . . .

In the provinces there is complementary legislation to this section which enables immediate committal of an accused to a proper institution for treatment where the circumstances warrant it.

Some representations were made to us supporting the view that the period of thirty days should be increased to sixty days. We do not recommend any change in this section. It would appear that in practice the period of thirty days has proved to be long enough, and in most cases longer than necessary, for observation for the purpose of diagnosis. If there are cases where a longer period may be considered necessary, a justice of the peace or magistrate may remand the accused for a further period upon proper evidence. The remand of an accused person to a mental hospital for examination involves serious custodial problems that have to be borne in mind in considering the period of the remand.

CHAPTER III

ON ARRAIGNMENT BEFORE A TRIBUNAL HAVING JURISDICTION TO TRY THE OFFENCE OR DURING TRIAL

Section 524 provides as follows:

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

(2) For the purposes of subsection (1), the following provisions apply, namely,

(a) where the accused is to be tried by a court composed of a judge and jury,

(i) if the issue is directed before the accused is given in charge to a jury for trial on the indictment, it shall be tried by twelve jurors, or in the Province of Alberta, by six jurors, and

(ii) if the issue is directed after the accused has been given in charge to a jury for trial on the indictment, the jury shall be sworn to try that issue in addition to the issue on which they are already sworn; and

(b) where the accused is to be tried by a judge or magistrate, he shall try the issue and render a verdict.

(3) Where the verdict is that the accused is not unfit on account of insanity to stand his trial, the arraignment or the trial shall proceed as if no such issue had been directed.

(4) Where the verdict is that the accused is unfit on account of insanity to stand his trial, the court, judge or magistrate shall order that the accused be kept in custody until the pleasure of the Lieutenant-Governor of the province is known, and any plea that has been pleaded shall be set aside and the jury shall be discharged.

(5) No proceeding pursuant to this section shall prevent the accused from being tried subsequently on the indictment.

No representations were made to us suggesting any change in this section, other than changes in terminology, except that it be enlarged in one respect. We prefer to discuss terminology under a separate heading, as it is a subject about which there was much discussion and some difference of opinion and applies to the whole law under examination.

Mr. H. H. Bull, Q.C., a member of the Bar of Ontario of very wide experience in criminal law, on the staff of the Crown Attorney of the City of Toronto and the County of York, made a suggestion that we think commendable. He expressed the view that a magistrate having jurisdiction to hold a preliminary hearing should also have jurisdiction to hear and determine whether the accused was, when called for preliminary hearing, unfit on account of insanity to stand his trial. Mr. Bull pointed out that by leaving the issue to be tried by the tribunal having jurisdiction to try the offence the accused is often required to remain for some considerable time in the common gaol, when in fact it is obvious and well known that he is on account of insanity unfit to stand his trial.

We think that a person who is unfit to instruct counsel at a preliminary hearing ought not to be asked to undergo a preliminary hearing.

The only objection put forward against Mr. Bull's suggestion was that in many parts of Canada the justices of the peace and the magistrates are not trained lawyers, and such a provision might make for a loose enforcement of the criminal law. We think this objection is untenable. The finding of the justice or magistrate need not be binding on the Crown, as a failure to commit for trial does not terminate the right of the Crown to continue the prosecution. The law should be so framed that, if at any time it is considered desirable, the Crown might proceed by way of indictment in those provinces where there is procedure by indictment, or by charge where the procedure in the higher court is by charge, to bring the case on for trial so that the issue could be determined either by a jury properly chosen or by a judge having jurisdiction.

We think the advantage of having the issue in obvious cases decided as early as possible much outweighs any disadvantage that could result from the suggested amendment to the law.

CHAPTER IV

PROCEDURE UPON THE TRIAL OF THE ISSUE OF CRIMINAL RESPONSIBILITY

Several of the medical witnesses and a few legal witnesses were in favour of far-reaching alterations in the procedural methods of determining criminal responsibility. The following suggestions were made to us:

(a) The jury should decide only whether the accused committed the act, and the question of criminal responsibility should be decided by a board of psychiatrists appointed by the court, or appointed, one by the Attorney General, one by the accused and one by agreement, or in default of agreement the third by the court.

(b) The court should decide only whether the accused committed the act charged, and a board of psychiatrists should report to the judge after the trial, on the mental condition of the prisoner. The judge would then take the report into consideration in disposing of the prisoner.

(c) The presiding judge, assisted by two psychiatrists sitting as assessors, as is done in Admiralty cases, should try the issue, while the jury should determine whether the accused committed the act.

There were different variations of these suggestions, but we consider that any of them would effect such drastic changes in the Canadian concept of the administration of the criminal law that none of them ought to be adopted. The great weight of responsible opinion is against taking from the tribunal of fact as now constituted the authority to decide whether or not an accused person should be found criminally responsible for his acts.

We do not consider it necessary to discuss the constitutional aspects of these suggestions further than to point out that there is grave question whether there is power in the Parliament of Canada, without an amendment to the British North America Act, to pass legislation taking from Her Majesty's courts, presided over by duly appointed judges, the duty of deciding whether an accused person should be found guilty of an offence or not guilty on any ground, and delegating that power to an administrative board, however constituted. Judges of the superior courts in the provinces in Canada who perform such duties are, under the terms of the British North America Act, appointed for life. We think there is much weight in the contention that, under the terms of the British North American Act as it now is, members of an administrative board could not be clothed with jurisdiction in those criminal cases in which the jurisdiction was traditionally exercised by Her Majesty's judges at Confederation.

Even if such legislative power exists, we do not think it would be wise to exercise it in the manner suggested. With great respect to those who have put forward these procedural changes, quite apart from the principle involved, there would be difficulties in administration in Canada, and we think these difficulties are conclusive against adopting these suggestions. Only a few of the difficulties need be mentioned, viz.:

(a) the board would have to determine the truth of statements put before it, either by being present at the trial and hearing the evidence or by reading a transcript;

(b) if the board had access to evidence bearing on the accused's mental condition not given at the trial, the value of the evidence would be assessed without examination or cross-examination;

(c) if the evidence before the board were to be subject to examination and cross-examination, there would in fact be two trials, one presided over by the judge and the other by the board;

(d) it is inherent in our conception of the administration of justice that criminal proceedings should be held in public, and that the function of the court should not be delegated to administrative tribunals which do not possess the independence of the courts.

To these may be added a fifth objection. The criminal law of Canada must apply to all of Canada, and the complications involved in putting into effect any procedure other than a determination of the guilt or innocence of the accused in one trial before a duly constituted court would raise insurmountable difficulties.

The chief reason underlying the suggestion of these drastic changes is to eliminate what to many seems to be an unseemly "battle of experts" in the courtroom. We feel confident that if there is embarrassment among medical witnesses by reason of expressed differences of opinion in court, the situation may be ameliorated by some recommendations which we are prepared to make rather than by any change in procedure with respect to the trial of the issue as to criminal responsibility.

CHAPTER V

THE LAW OF INSANITY AS A DEFENCE ON A PLEA OF NOT GUILTY

The law of insanity as a defence on a plea of not guilty must necessarily be considered in the two main aspects: (a) the substantive law, and (b) procedure.

Having dealt with the important representations made to us about procedure, it is convenient to discuss the substantive law and the representations made to us as far as possible apart from procedure. This is not entirely possible, however, as certain of the changes in the substantive law suggested were coupled with those far-reaching changes in the procedure that we cannot recommend.

A proper consideration of the suggested changes in the substantive law requires a precise and accurate knowledge of the law as it now is in Canada, and without any confusion with the law of England or that of other countries where the subject of criminal responsibility is so much discussed in legal and medical literature with constant reference to the M'Naghten Rules and the "right and wrong" test.

The rules laid down by the judges in England in answer to the questions submitted to them arising out of the M'Naghten case[1] form a historical background to the Canadian law, but neither the answers propounded nor the jurisprudence founded on them in England constitutes the Canadian law.

The Canadian law is statutory, and as such must receive and has received interpretation and application according to the principles applicable to statute law in Canada. Section 16 of the Criminal Code, which came into force on April 1, 1955, is not a section defining insanity in a medical sense, but one of those sections of the statute law of Canada dealing with responsibility for crime. It reads:

> 16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
>
> (2) For the purposes of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.
>
> (3) A person who has specific delusions, but is in other respects sane, shall not be acquitted on the ground of insanity unless the delusions caused him to believe in the existence of a state of things that, if it existed, would have justified or excused his act or omission.
>
> (4) Every one shall, until the contrary is proved, be presumed to be and to have been sane.

This section replaces section 19 of the Criminal Code, which came into effect in Canada on the first day of July, 1893. As we shall have to discuss some changes in the revision of 1953, we set out the previous section in full:

> 19. No person shall be convicted of an offence by reason of an act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, and of knowing that such an act or omission was wrong.
>
> 2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.
>
> 3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.

This statutory provision defining criminal responsibility is subject to the provisions of the Interpretation Act,[2] which read as follows:

[1] 10 Cl. and F. 200.
[2] R.S.C. 1952, c. 158, s. 15.

> Every Act and every provision and enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of any thing that Parliament deems to be for the public good, or to prevent or punish the doing of any thing that it deems contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment, according to its true intent, meaning and spirit.

The object of subsections (1), (2) and (3) of section 16 of the Criminal Code is to exempt from criminal responsibility those who, on a fair, large and liberal construction and interpretation of those sections, ought not to be held criminally responsible for their acts. It follows, therefore, that the Canadian courts ought not to be criticized if the law has been interpreted liberally in Canada. In so doing the courts have not been "stretching" the wording of these subsections, as has been sometimes suggested, but have been applying the whole law, as section 16 of the Criminal Code cannot be dissociated from section 15 of the Interpretation Act, and the two sections must be read together.

Mr. Justice Hodgins, of the Ontario Court of Appeal, in clear language laid down the principles to guide judges in the application of the provisions of section 10 of the Ontario Interpretation Act, which are similar to the relevant section of the Dominion Act:

> The rule laid down in the Interpretation Act, R.S.O. 1914, ch. 1, sec. 10, is that statutes shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof." It is therefore open to the Court to adopt the larger or later meaning of the word in question, if it be true, as I think it is, that the Assessment Act in this particular aims at exempting such means as may be adopted at the mining location to aid in the concentration of the ore-mass, even if that progresses to the point of using chemical means as well as those mechanical, and in so doing draws within its scope some part of what may be alternatively described as amalgamation or reduction: see *Attorney-General v. Salt Union Limited*, (1917) 2 K.B. 488, per Lush, J. In this connection I refer to the language of Cozens-Hardy, M.R., in *Camden (Marquis) v. Inland Revenue Commissioners* (1914) 1 K.B. 641, at pp. 647 and 648: "The duty of this Court is to interpret and give full effect to the words used by the Legislature, and *it seems to me really not relevant to consider what a particular branch of the public may or may not understand to be the meaning of those words. It is for the Court to interpret the statute as best they can.* In so doing the Court may no doubt assist themselves in the discharge of their duty by any literary help which they can find, including of course the consultation of standard authors and reference to well-known and authoritative dictionaries, which refer to the sources in which the interpretation which they give to the words of the English language is to be found. But to say we ought to allow evidence to be given as to whether there is any such technical meaning, to be followed up, of course, by evidence as to what that special meaning is, would I think be going entirely contrary to that which seems to be the settled rule of interpretation."[1]

That the section has been liberally construed, as it must be, is demonstrated by reference to some of the Canadian cases. The word "and" preceding the words "of knowing" in the section of the Code as it was until April 1, 1955, was interpreted as "or" by the Court of Appeal for Ontario, where the trial judge had instructed a jury that the onus was on the accused to prove all of the elements mentioned in the sub-section—i.e., that he was suffering from a disease of the mind to an extent that rendered him not only incapable of appreciating the nature and quality of the act but also of knowing that the act was wrong.

> Here, if the accused did not know that in killing his wife he was doing what was wrong he had no guilty intention and therefore was not guilty of murder, even though he might have appreciated the physical not the moral nature and quality of his act.[2]

Again, the Canadian courts have given effect to the spirit of the law in determining the burden that lies on the accused person to rebut the presumption of sanity. The burden that lies on the accused person in Canada is to prove the defence under the section properly interpreted by proof of insanity "to the reasonable satisfaction of the jury", and the evidence

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[1] Re McIntyre Porcupine Mines Ltd. and Morgan, (1921) 49 O.L.R. 214, at 219.
[2] R. v. Cracknell, (1931) O.R. 634, per Mulock C.J.O. at 637.

is sufficient if the defence is established by "a mere preponderance of probability".[1] While according to the M'Naghten Rules the defence must be clearly proved, the distinction has been emphasized in Canada.[2] The standard of proof now required in England would appear to be no higher than that required in Canada.[3]

It is at once apparent that some of the discussion of the subject before us and much carried on in other countries has little or no application to the subject in Canada. The criticism that the law is not strictly but liberally interpreted and applied in England is not a just criticism of the interpretation and application of the Canadian law, because in Canada the judges are bound to construe the law in such fair, large and liberal manner as best to attain its object. We think much of the literature on the subject, especially that written in the United States of America, has caused much confusion in the discussion of the law in Canada, because many who appeared before us quoted authorities who discussed either the common law of England or statute law of states of the United States of America without specific consideration of the exact statute law of Canada.

For the purpose of convenience, we set out the M'Naghten Rules:

THE RULES IN M'NAGHTEN'S CASE (1843)

(10 Cl. and F. 200 at p. 209)

(Q. I.) "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?"

(A. I.) "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 accused did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land."

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

(Q. III.) "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?"

(A. II and III.) "As these two questions appear to us to be more conveniently answered together, we submit our opinion to be that the jury ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the

[1] Smythe v. The King, 1941 S.C.R. 17.
[2] R. v. Chupiuk, 8 C.R. 398, (1949) 2 W.W.R. 801.
[3] Sodeman v. R. (1936) 2 All E.R. 1138.

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 that he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the accused had 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."

(Q. IV.) "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

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

(Q. V.) "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?"

(A. V.) "We think the medical man, under the circumstances supposed, cannot, in strictness, be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not questions upon a mere matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

A careful examination of the applicable provisions of the Canadian statutes and the M'Naughten Rules demonstrates that there is a difference between the legislation in Canada and the English jurisprudence which goes to the very root of the determination of criminal responsibility. The phrase used in Canada is "incapable of appreciating the nature and quality of the act" (since April 1, 1955, "appreciating the nature and quality of *an* act"). This is not synonymous with knowing the nature and quality of a physical act.

The test to be applied by the jury in English jurisprudence is concisely stated: "Did the person know what he was doing? or, if not, did he know that he was doing wrong?"[1] The distinction between mere knowledge and appreciation of the nature and quality of the act may be indicated by a careful reading of the judgment of the House of Lords in the *Beard* case, the *Mead* case, and the reference to the *Beard* case by Duff C. J. Where he said:

> Again the judgment of the Lord Chancellor makes it quite clear that the defence founded upon drunkenness was not that Beard was so drunk as to be incapable of forming the intent to commit rape, but that he was incapable of measuring or foreseeing the consequences of his violent act . . .[2]

The decision in the House of Lords was that the proof of the capacity to have the intent to commit rape was sufficient when death resulted from the felony without entering on an inquiry as to whether the accused was incapable by reason of drunkenness of "measuring and foreseeing" the consequences of his violent conduct. The language used in these leading cases in England and Canada indicates that there is an important distinction to be drawn under Canadian law between a mental capacity, whether caused by drunkenness or disease of the mind, to "know" what is being done and a mental capacity to "foresee and measure

[1] R. v. Beard, (1920) A.C. 479, at 505.
[2] R. v. Hughes, 1942 S.C.R. 517, at 524.

the consequences of the act". It is to be pointed out, however, that in making the statement quoted from the judgment of Duff C. J. in the *Hughes* case the learned Chief Justice was not interpreting the Canadian law of insanity but was referring to the argument in the *Beard* case.

Under the Canadian statute law a disease of the mind that renders the accused person incapable of an appreciation of the nature and quality of the act must necessarily involve more than mere knowledge that the act is being committed; there must be an appreciation of the factors involved in the act and a mental capacity to measure and foresee the consequences of the violent conduct.

The difference in this respect between the Canadian law and the M'Naghten Rules can be no better demonstrated than in the statement made before the Royal Commission presided over by Sir Ernest Arthur Gowers in England, by Sir David Henderson, who stated:

> The M'Naghten Rules are no longer in harmony with medical knowledge, and furthermore Judges themselves vary greatly in their interpretation of them . . . In my opinion . . . there are many different forms of mental disorder, all of which equally should exonerate a person from a charge of criminal conduct — e.g. melancholia, schizophrenia, paranoid states, general paralysis, senile dementia, epilepsy with insanity, and many others. In many of the above cases the individual's mind is sufficiently clear to know what he is doing, but at the same time *the true significance of his conduct is not appreciated* either in relation to himself or others.

The word "appreciating", not being a word that is synonymous with "knowing", requires far-reaching legal and medical consideration when discussing Canadian law. It had its origin in the Stephen Draft Code. Not infrequently judicial reference is made to the New Oxford Dictionary for the definition of words used in Canadian statutes. The New Oxford Dictionary gives five different uses of the word "appreciate", depending on the context. The one applicable to this statute is:

> 2. To estimate aright, to perceive the full force of.
>
> b. esp. to be sensitive to, or sensible of, any delicate impression or distinction.
>
> "Until the truth of any thing . . . be appreciated, its error, if any, cannot be detected."

An examination of the civil law of England and Canada shows that there is an important difference between "know" or "knowledge" on the one hand and "appreciate" or "appreciation" on the other when used and applied to a given set of circumstances. This is best illustrated by the principles of law underlying those cases in which the maxim *volenti non fit injuria* is involved. There is a clear distinction between mere knowledge of the risk and appreciation of both the risk and the danger. Lord Justice Bowen said:

> But where the danger is one incident to a perfectly lawful use of his own premises, neither contrary to statute nor common law, where the danger is visible and the risk appreciated, and where the injured person, knowing and appreciating both risk and danger, voluntarily encounters them, there is, in the absence of further acts of omission or commission, no evidence of negligence on the part of the occupier at all. Knowledge is not a conclusive defence in itself.[1]

Lord Esher, Master of the Rolls, said:

> . . . mere knowledge of the danger will not do: there must be an assent on the part of the workman to accept the risk, with a full appreciation of its extent, to bring the workman within the maxim Volenti non fit injuria.[2]

This with great clarity distinguishes between mere knowledge and appreciation that foresees the probable consequences that flow from a given act.

Duff, J. (later, Chief Justice) said:

> Indeed, the respondent was not only not *volens*, he was not, in the pertinent sense, *sciens;* he had not, that is to say, *a real appreciation of the risk involved* in attempting to pass over the gangway in the prevailing obscurity.[3]

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[1] Thomas v. Quartermaine, (1887) 18 Q.B.D. 685, at 687; 56 L.J.Q.B. 340; 57 L.T. 537.
[2] Yarmouth v. France, 19 Q.B.D. 647, at 657.
[3] General Trust of Canada v. St. Jacques, (1931) S.C.R. 711; (1931) 3 D.L.R. 654, at 655.

Applying this law by analogy to the language of section 16 of the Criminal Code, it will be clear that mere knowledge of the nature and quality of the act ("Did the person know what he was doing?") is not the true test to be applied. The true test necessarily is, was the accused person at the very time of the offence—not before or after, but at the moment of the offence—by reason of disease of the mind, unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it? In other words, was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act?

The word "wrong" as used in section 16 of the Criminal Code has not yet been interpreted by the Supreme Court of Canada. The Ontario Court of Appeal ordered a new trial where the court was of the opinion that no reasonable jury could find that the accused was by reason of disease of the mind incapable of appreciating the nature and quality of the act and on the evidence he admitted that he knew the act was against the law but the court was of the view that the evidence of the psychiatrist, which tended to show that, although the accused knew the act was against the law, nevertheless by reason of disease of the mind he believed it was the right thing to do, was not properly put before the jury.[1] The Alberta Court of Appeal would appear to restrict the word "wrong" to legally wrong, but it is clear from the judgment that it did not consider the effect of the statute law of Canada but was considering only the common law of England and applying the English law.[2]

In the 1955 revision of the Criminal Code the phrase "et de se rendre compte que cet acte ou cette omission était mal" in the French translation was changed to "ou de savoir qu'un acte ou une omission est mauvaise". It would appear that the Commissioners revising the Code in translating the word "wrong", "mauvaise" rather than "mal", intended to make it clearer that the interpretation of the word "wrong" was not to be restricted to "illegal". In Harrap's Standard French and English Dictionary "mauvaise" is translated as meaning "evil, ill, wicked". If the Commission in revising the Criminal Code intended to restrict the meaning of the word "wrong" in translating to "illegal", the word "illegal" would have been a much more appropriate word to use.

Applying the provisions of the Interpretation Act, the word "wrong" must be given a broad meaning. We think it means wrong not only in the legal sense but something that would be condemned in the eyes of mankind.

We think that where the defence of insanity is in issue the proper instruction to a jury should be along the following lines: "If you find on a mere preponderance of probability based on the evidence taken as a whole the accused was labouring under natural imbecility or disease of the mind to such an extent as to render him incapable of foreseeing and measuring the consequences of his act or of estimating aright or perceiving the full force of his act, you should find him not guilty on account of insanity; or if on a mere preponderance of probability based on the evidence taken as a whole you come to the conclusion that the accused was labouring under natural imbecility or disease of the mind to such an extent that he was incapable of knowing that the act was wrong (and by that I do not mean merely legally wrong, but wrong in the sense that it was something he ought not to do and for which he would be condemned in the eyes of his fellow men), you should find him not guilty on account of insanity."

As we conceive it, the function of the criminal law is to regulate relations among the Queen's subjects, and it must be viewed from the point of view that those who are responsible for their acts should be held accountable for the protection of society and that those who are not responsible should not be held to be criminal offenders.

In the light of the Canadian law, we have carefully considered and weighed the evidence submitted before us to determine the answer to two main questions which we think are the questions that dominate our inquiry:

(a) Does the evidence show that the whole law as it is now interpreted and applied in Canada adequately functions to accomplish its object, i.e., to protect from criminal respon-

[1] R. v. Laycock, 104 Can. C.C. 274.
[2] R. v. Cardinal, (1953) 10 W.W.R., N.S., 403.

sibility those who ought to be protected from criminal responsibility and at the same time hold responsible those who ought to be held responsible?

(b) Has any alternative been suggested that we can recommend to Parliament with confidence that it will better fulfil the object of the law as we consider it to be?

As we stated, we do not think the substantive law can be considered entirely apart from procedure or apart from the exercise of the statutory right of commutation and the royal prerogative of mercy. It was argued by some that the law defining criminal responsibility should be so exhaustive as to encompass all those cases in which commutation is exercised. We think that is idealistic but not realistic. No one suggested that either the statutory right of commutation or the exercise of the royal prerogative of mercy should be limited or in any way interfered with where there was a relevant mental condition for consideration. It is obvious that these humane provisions of our law must remain, and we do not think it possible to draft a statute that would be a satisfactory instrument in the administration of justice and would function without much abuse if it were to encompass all those cases in which commutation is now exercised.

CHAPTER VI

THE ADMINISTRATION OF THE LAW IN CANADA

We now deal with the submissions and recommendations made to us about the law and its administration.

A careful review of all the evidence fails to show with assurance that it can be said there has been a miscarriage of justice detrimental to an accused person. On the other hand, there is considerable reliable evidence given by those with wide experience in the administration of the criminal law that under the present law as applied several persons have been found not guilty on account of insanity who have suffered from no mental disease.

Taken on the basis of and giving proper weight to the reliable evidence that has come before us, we feel that we cannot come to any other conclusion than that over the period of years with respect to which those witnesses who came before us could give evidence—and many witnesses could give evidence extending over more than twenty-five years—the law taken as a whole and as administered and applied has functioned to do justice in Canada.

The problem before us cannot be considered as other than a legal one. We are not concerned in defining "insanity", "mental disease" or "mental illness". We are concerned with a law that defines criminal responsibility in such language as a jury of laymen can understand and apply to the facts of a given case before them and that will not be subject to grave distortion in the courtroom. A courtroom cannot under our procedure be converted into a medical clinic. It is probable that the full realization of what we have just stated accounts for the fact that those who have had most intimate contact and experience with the present law and its administration over a considerable period of years have expressed very definite views against any change.

Judicial opinion.

In response to our invitation to the Chief Justices in the provinces, judges of the superior courts who had the widest experience in the administration of the criminal law in the provinces were asked to appear before the Commission and submit their views on the subject, or, if it was not convenient to appear before the Commission, to submit their views in writing. We feel we can say with assurance that we have had the benefit of the best judicial opinion from those in Canada whose duties have brought them in close touch with the question we have to consider. In many cases the views were expressed by personal appearance, and in other cases in writing. The vastly preponderant weight of the judicial views is that there should be no change in the present substantive law. In the view of the judges, the law has worked very satisfactorily and without miscarriage of justice. Some, but a very small proportion, of the judicial opinion was that there were cases that could not come within a strict interpretation of the present law, but these cases were taken care of by the exercise of the right of commutation. Those who held this view could suggest no alternative to make for a better administration of justice. We feel that there is no group in Canada in a position to consider the subject more objectively or better able to give an authoritative opinion than the judges who expressed their views to us, either individually or collectively.

Medical opinion.

The weight of medical opinion was likewise opposed to any change in the law except as to terminology. Some recommendations were made as to better procedure which would not involve the alienation of the right of the accused to have all issues of fact tried by a jury.

Canadian Psychiatric Association.

On the appointment of the Commission, the Canadian Psychiatric Association, which is the official association of the members of the medical profession who specialize in psychiatry throughout Canada, set up a committee consisting of certain members from all of the ten

provinces in Canada, under the chairmanship of Dr. Kenneth G. Gray, a certified specialist in psychiatry who is engaged in the practice of his profession in Toronto and as a professor in the Department of Psychiatry in the University of Toronto. There were corresponding members in each province, and in addition a great number of psychiatrists received a draft of the brief which was presented to the Commission. It was not submitted to a general meeting of the Association, but local representatives were asked to discuss it with local groups of psychiatrists. A relatively small number of psychiatrists were at variance with the brief. It was suggested to each of them that he should appear before the Commission and express his individual point of view. The brief was presented jointly by Dr. Gray and Dr. Roberts, Secretary of the Association. Dr. Roberts said:

> I think it may be said that this (the brief) represents the over-all generally agreed view of the Association.

As may be observed, we gave the widest opportunity to those who had views at variance with the brief submitted by the Association to appear before the Commission, and we shall make some reference to the evidence of particular witnesses.

The brief of the Canadian Psychiatric Association (Exhibit 5) is concise, and it is convenient to set it out in detail:

Presentation by the Canadian Psychiatric Association to the Royal Commission appointed to study the Revision of the Criminal Code with Respect to Insanity.
Relationship to Capital Punishment

In formulating the recommendations of the Association, it is necessary to say something about the relationship of capital punishment to the defence of insanity. It is the view of the Association that there is such a relationship and that our recommendations should be divided into the following groups: (a) where capital punishment is retained, (b) where capital punishment is abolished and (c) recommendations which are independent of the retention or abolition of capital punishment.

In existing trials, where an accused person is charged with murder and the defence is insanity, the result is that the accused is hanged if the plea is unsuccessful, whereas he is held at the pleasure of the Lieutenant-Governor (which usually means life detention in a mental hospital) if the plea is successful. In other words, the result of the plea of insanity means life or death for the accused.

It seems self-evident that in our system of jurisprudence there is only one method whereby this issue may be determined and that is by the verdict of a jury.

It also seems likely that the right of an accused person or his counsel to select the medical witnesses who will give testimony on his behalf must be retained.

It follows that in some cases there may be a difference of opinion between psychiatrists giving evidence for the Crown and psychiatrists giving evidence for the defence.

This conflict of expert evidence is regrettable but we feel we must be realistic and recognize that it may occur in some cases. There is doubt that the conflict of opinion in psychiatric cases in the courts is more frequent or more pronounced than in other types of expert evidence. In seeking an explanation of this conflict of opinion, it is to be remembered that the psychiatrists who give evidence are required to conduct their examinations under difficult circumstances. The examinations are usually conducted in jails and the psychiatrist is dependent upon information which he can gain from one or more interviews with the accused and interviews with other persons having knowledge of the facts. The psychiatrist is deprived of the facilities which are available to him in a modern hospital to assist in his investigation.

If the foregoing statements are accepted as correct, it follows that some of the suggestions which have been put forward from time to time for the purpose of abolishing the conflict in expert testimony are not likely to succeed. These suggestions include such measures as withdrawing the question of insanity from the jury and leaving it to the determination of the trial judge; the appointment of an independent panel of expert witnesses and related procedures.

In these circumstances, we do not recommend that substantial change in the M'Naghten Rules. One change which has been suggested from time to time is that the Rules should be enlarged to include a person who is unable to control his conduct by

reason of a mental illness primarily due to emotional factors and without impairment of the cognitive faculties. It is considered that so long as capital punishment is retained, with the foregoing consequences, this widening of the M'Naghten Rules would increase the number of cases in which there would be a conflict of psychiatric testimony. This carries with it a risk that the administration of justice would be weakened.

With this background in mind, the following recommendations are presented.

(a) *Where Capital Punishment is Retained*

These recommendations are in addition to those under heading (c) below. The Association believes that there are two measures which would tend to mitigate the divergence of opinion in these cases.

First, it is recommended that wherever possible the psychiatric examination of an accused person be conducted in a mental hospital. Authority for this procedure is contained in section 679(c) of the Criminal Code and also some of the provincial statutes. Such an examination is obviously more thorough than an examination conducted in a jail and should reduce the likelihood of differences in professional opinion.

Secondly, it is recommended that before trial there should be an interchange of the reports of psychiatrists who have examined the accused on behalf of the Crown and the defence. If this cannot be accomplished by administrative encouragement, we recommend that the rules be amended to make such an interchange mandatory. It is also desirable that the psychiatrists confer in advance of the trial. Every encouragement should be given to this procedure, including payment of the psychiatrists' expenses in attending such a conference. We believe that such an interchange of reports and pretrial conference would reduce the conflict of opinion and would tend to emphasize the points on which agreement has been reached rather than the points in respect to which differences of opinion exist.

(b) *Where Capital Punishment is Abolished*

In the event that capital punishment were abolished, there would be a drastic change in the use of psychiatric evidence in homicide cases. Instead of psychiatric evidence being used primarily to avoid the death sentence, psychiatric evidence could be used primarily to determine whether the accused person should be confined to a penal institution or a mental institution.

In this event we would recommend that psychiatric evidence be not introduced until after the jury has convicted the accused person. The psychiatric evidence could be reserved to be heard by the judge to assist him in passing sentence.

It is our understanding that this is characteristic of the system which prevails in Norway and Sweden.

Psychiatric evidence would be directed to the question of whether or not there exists any mental illness or mental deficiency which is relevant to the sentence to be passed upon the accused person. The evidence could be used by the trial judge to assist him in deciding whether there should be any mitigation of sentence and whether the sentence should be spent in a penal or mental institution.

If this arrangement were adopted, the M'Naghten Rules could be repealed.

(c) *Recommendations which are Independent of the Retention or Abolition of Capital Punishment*

Irrespective of whether capital punishment is retained or abolished, the Association recommends that the Criminal Code be amended by substituting modern terminology for some of the archaic language used in describing forms of mental deviation. The suggested changes are set out in a brief compiled by the Canadian Mental Health Association, which we endorse.

We feel that attention should be directed to the increasing use of psychiatric evidence in criminal cases. We refer particularly to the use of such evidence in summary trials. The reason for obtaining a psychiatric report in these cases is not primarily to determine culpability but rather to ascertain the existence of any mental deviation which could be resolved by treatment. Hundreds of these examinations are being carried out each year in Canada for magistrates', juvenile and family courts. It is customary for the judge or magistrate to receive a written (unsworn) report.

It is recommended that if necessary the Criminal Code be amended to legalize the existing practice of receiving these unsworn reports, with the understanding that the author of the report may be subpoenaed for cross-examination when necessary.

We suggest that the Commission survey the existing facilities for conducting psychiatric examinations in criminal cases. These facilities are under provincial jurisdiction and there is likely to be considerable variation in their establishment. The survey may lead to an appraisal of the adequacy of these facilities.

Finally, this brief calls attention to the subject of the disposal of persons who are acquitted of crimes by reason of a defence of insanity. The Criminal Code provides that these persons shall be held at the pleasure of the Lieutenant-Governor. This means of course that they are held under the jurisdiction of the various provincial governments. It will be found that the provinces differ greatly with respect to the custody of these persons, including the mode of determining applications for release, official attitudes toward release and allied matters. It may be possible for the Commission to recommend a more uniform procedure in the disposal of these cases.

We are making this report on the assumption that capital punishment is to be retained as part of the law of Canada. If it is not, the evidence before us justifies the conclusion that the subject incorporated in the terms of reference is very academic, as all the evidence goes to show that, except in the most obvious cases, the defence of insanity is raised only where the offence is punishable by death.

It is to be noted that the brief of the Canadian Psychiatric Association is based on a conception of a narrower interpretation of the law than that which we believe to be the correct one.

The representations of the Canadian Psychiatric Association were endorsed by the Ontario Division of the Canadian Medical Association and by the British Columbia Division of the Canadian Medical Association.

We now discuss the medical evidence submitted apart from the representations on behalf of the Canadian Psychiatric Association.

Province of Quebec Psychiatric Association.

A brief (Exhibit 27) was submitted by the Province of Quebec Psychiatric Association, which dealt mainly with changes in terminology. It was stated in the brief:

> In connection with the test having reference to the M'Naghten Rules, we readily admit that these are inadequate and perhaps too severe. They should be softened, because they may lead to the finding of a mentally ill person as guilty. Unfortunately, we must admit that we are unable to suggest, at the present time, any effectual or general alterations. It is plainly the duty of the Court to weigh each case in particular as it is submitted, with the help of expert psychiatric evidence.

This does not take into consideration a statement of the Canadian law as we conceive it.

Department of Psychiatry, Faculty of Medicine, University of Manitoba, and the Psychiatric Section, Manitoba Division, of the Canadian Medical Association.

A joint Committee of the Department of Psychiatry, Faculty of Medicine, University of Manitoba, and the Psychiatric Section, Manitoba Division, of the Canadian Medical Association submitted a brief (Exhibit 15) making no representation as to a change in the present law, with the exception of the deletion of the word "natural" in subsection (2) and the words "but in other respects sane" in subsection (3) and the restoration of the word "the" prior to the word "act" in subsection (2) in place of the word "an".

Saskatchewan Psychiatric Association.

A brief (Exhibit 18) submitted on behalf of the Saskatchewan Psychiatric Association recommended that the present law be completely abrogated and that once the accused person has been found guilty of committing the act the judge should then call upon a panel of psychiatrists to present a joint report on the mental state of the accused person at the

time of the act and at the time of the examination subsequently. The judge would, in the light of the report, pass judgment as to the disposal of the accused person.

Canadian Mental Health Association, Saskatchewan Division.

In a brief (Exhibit 19) submitted by the Canadian Mental Health Association, Saskatchewan Division, it was stated:

> It has frequently been said that the M'Naghten Rules as they stand are highly unsatisfactory but that nothing better has been found to put in their place.

In presenting the brief Dr. Lucy said:

> The fact remains that, as the M'Naghten Rules are now administered by the courts, they do seem to be reasonably equitable.

As to irresistible impulse, he said:

> I think it is extremely difficult to say whether there is such a thing as irresistible impulse or not. As I say, I think it requires a far greater knowledge of people's minds than people possess at the present time . . .

Medical Staffs of Division of Mental Health, Alberta, the Faculty of Medicine of the University of Alberta, the College of Physicians and Surgeons of Alberta, the Alberta Division of the Canadian Medical Association, and the Alberta Psychiatric Association.

A joint presentation (Exhibit 22) was made by the Director and the Mental Hospitals' Medical Staffs, Division of Mental Health, Alberta, the Faculty of Medicine of the University of Alberta, the College of Physicians and Surgeons of Alberta, the Alberta Division of the Canadian Medical Association, and the Alberta Psychiatric Association. As the psychiatric representatives of these several organizations are the same individuals, it was considered expedient to make one submission. It was submitted that no person should be convicted of an offence by reason of an act done or omitted by him while suffering from a psychosis. There was considerable divergence of opinion as to what term should be used. This recommendation was coupled with a recommendation that in all cases involving major crime against the person the accused person should be examined independently by more than one psychiatrist and the reports of the examinations should be submitted to the trial judge. In presenting the report, Dr. MacLean stated that the intention was that the examination should be made after trial and that the decision of the psychiatrists and not the jury should be final. The result of this recommendation is that the report of the psychiatrists would have no bearing on the guilt or innocence of the accused person and would withdraw the issue of criminal responsibility from the tribunal of fact.

Canadian Psychological Association.

The Canadian Psychological Association, consisting of six hundred qualified psychologists from all parts of Canada, in a letter (dated August 30, 1954, Exhibit 41) to the Commission endorsed the brief of the Canadian Psychiatric Association.

Individual medical witnesses.

The medical witnesses who appeared individually may be classified as follows:

(a) Those who have had long and intimate experience in the administration of the law.

(b) Those who have had some experience with the administration of the law.

(c) Those who have had no experience with the administration of the law but have studied it from an academic point of view.

We shall discuss first the evidence of those who have advocated a change in the present law. The following suggestions were put forward:

(a) That the present law should be retained but something should be added which would take into consideration irresistible impulse as a result of mental disease; but, it was

stated, there would be great difficulty in determining the difference between an unresisted impulse and an irresistible impulse. (Dr. Prosser, at p. 107, suggested this could not be determined by a jury but would have to be determined by expert psychiatrists).

(b) That the law should be abrogated. The psychiatrist should answer only the question whether or not the accused person is mentally ill. (Dr. Weil, p. 234).

(c) That the recommendation of the British Medical Association to the Royal Commission in England should be adopted, by adding the words

> a disorder of emotion such that, while appreciating the nature and quality of the act, and that it was wrong, he did not possess sufficient power to prevent himself from committing it.

(Dr. Black, p. 442).

(d) The law should be completely abrogated and the issue determined by a panel of psychiatrists who would report to the judge, who would, with the aid of the report, pass judgment. (Dr. M. G. Martin, p. 729).

(e) No one should be convicted of an offence committed while suffering from a psychosis. This was coupled with the recommendation that the issue be decided by a board of psychiatrists or a judge sitting with assessors. (Dr. MacLean, p. 698. See also Dr. Stevenson, p. 780).

(f) The rules should be abrogated, the judge to receive a report from a board of psychiatrists. (Dr. Stevenson, p. 759).

(g) Many people suffer from mental illness who are not covered by the present law, but no suggestion was put forward as to how the law could be framed to cover them. (Dr. MacLeod, p. 1008. Reference also to Exhibit 27, p. 1226-B2).

(h) The law should be abrogated. If the question of mental disease is raised it should be determined, and, if mental disease is established, it would affect the penalty; but doubt was expressed that a law could be devised that would set down in writing a dividing line between those who are responsible and those who are not. (Dr. Reed, p. 1066).

(i) The law is not satisfactory. There are many fine points in it if a medical witness will examine it. If the word "appreciate" is properly considered it is helpful to overcome criticism of the law. A defence of irresistible impulse should not be included. (Dr. Doyle, pp. 1686, 1688).

It will be observed that most of those who advocated either the abrogation of the present law or substantial change in it, at the same time recommended that the issue be taken out of present judicial process.

In addition to the briefs from organized medical bodies, many medical witnesses of very wide experience, most of whom had much forensic experience, gave it as their opinion that the law ought not to be changed. Many said that, while it was not entirely satisfactory as worded, in experience it worked satisfactorily, and alternatives that would make for better administration of justice could not be put forward.[1]

The evidence of all the medical witnesses who were either in favour of no alteration in the present law or had no satisfactory alternative to suggest may be summarized in this way: Though some felt that the present wording of subsection (2) of section 16 is not entirely satisfactory, in practice it has worked satisfactorily in its application to the cases that came before the courts. None of those who expressed doubts about the present wording have felt they have any alternative to offer.

The preponderance of opinion of all the medical evidence is against the introduction of a defence of irresistible impulse.

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[1] Dr. Menzies, pp. 119 et seq.; Dr. Murchison, pp. 178 et seq.—would leave the decision to the judge. Dr. Pottle, p. 427; Dr. O'Brien, p. 431; Dr. Mathers, p. 537; Dr. Pincock, pp. 574 et seq.; Dr. McKerracher, pp. 587, 595; Dr. Nelson, p. 618; Dr. Gray, p. 1341; Dr. Senn, p. 1534; Dr. Tennant, p. 1309; Dr. Farrar, p. 1557; Dr. Cathcart, p. 1705. Dr. Huard, at pp. 1027 et seq., Dr. C. Martin, at pp. 1133 et seq., and Dr. Larue, at pp. 1158 et seq., endorsed the brief of the Quebec Psychiatric Association.

On the most careful review of all the medical evidence, the weight of the evidence is preponderantly against any change in subsection (2) except as to terminology. In most cases where medical witnesses suggested definite changes in the substantive law they contemplated a decision by other than our present judicial process.

The medical witnesses were, however, almost unaninous in condemnation of the wording of subsection (3) of section 16. The medical opinion is that this subsection describes a condition that does not exist. Medical witnesses agree that if a person suffers from "specific delusions" as a result of disease of the mind he cannot be "in other respects sane". Some medical witnesses were in favour of the elimination of the subsection as a defence, as in their opinion the condition contemplated by the subsection could be raised under subsection (2). Others took the view that, although the subsection was objectionable from a medical point of view, it has in practice gained a legal significance that interpreted a mental condition to the lay mind. We shall deal further with this subsection.

Representations by Members of the Bars of the Provinces.

Members of the bars of the provinces in Canada, like those of the medical profession, responded generously to assist us in our deliberations. The Canadian Bar Association made representations as a body, and the provincial committees of the Criminal Law Section of the Canadian Bar Association in certain provinces filed briefs. The views expressed by the members of the bar were at great variance. The individual members appearing before us may be divided into three classes:

(a) those whose practice in the criminal courts is on the Crown side;

(b) those who usually conduct defences;

(c) those who do not practise in the courts but teach criminal law.

In some cases, however, those coming within classes (a) and (b) teach law in the universities or law schools in Canada, and others have had considerable experience both on the Crown side and as defence counsel.

Canadian Bar Association.

The only representation from the Canadian Bar Association was contained in the following resolution:

> RESOLVED that the Canadian Bar Association recommends to the Royal Commission on Insanity presided over by Chief Justice McRuer and to the Department of Justice that a doubt concerning the capacity to form the necessary intention even though it is based on insanity evidence should be resolved in favour of an accused in reducing what would otherwise be murder to manslaughter.

We shall deal later with the standard of proof and the subject of diminished responsibility.

New Brunswick Committee of Criminal Law Section of the Canadian Bar Association.

The New Brunswick Committee of the Criminal Law Section of the Canadian Bar Association filed a brief (Exhibit 8) which expressed the majority view of the committee. It proposed that the first subsection of section 19 be replaced by a section worded as follows:

> 19 (now 16). No person shall be convicted of an offence by reason of an act done or omitted by him while suffering an impairment of mental faculties to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, or of knowing that such an act or omission was wrong.

It was stated, however, that, while it was considered that the test of responsibility was the proper one, it was not recommended that this question should be put to the jury baldly.

> We favour the retention of a definition of irresponsibility in terms of a degree of impairment of mental faculties.

The committee rejected proposals for the enlargement of the definition to include the so-called "irresistible impulses",

> because we do not believe that a person whose mental faculties are impaired to a lesser degree than that which will prevent appreciation and understanding can be said to be totally incapable of control.

The majority of the committee were in agreement that the principle of diminished responsibility due to mental impairment should be recognized in murder cases, giving to a jury the right to reduce the verdict from murder to manslaughter, and that any doubt with respect to the diminished responsibility should be resolved in favour of the accused person. The recommendation was that in all other respects the onus should remain unchanged.

It may be pointed out that the frailty of the recommended wording is that it would encompass a wide range of mental impairment unrelated to mental disease, which would be a far-reaching and drastic change in the criminal law. There would also result great confusion in the minds of lay jurymen where the onus varied in relation to different aspects of the case.

Suggestions to the Committee on Uniformity of Legislation (Criminal Law Section) in 1948 (not adopted).

Louis H. McDonald, Director of the Criminal Division of the Department of the Attorney General for the Province of Nova Scotia, submitted a brief (Exhibit 11) that had been prepared for presentation to the Committee on Uniformity of Legislation (Criminal Law Section) in 1948 but was not adopted by the Committee. The minutes of the Section stated that there was much opposition to the suggestion that irresistible impulse should constitute a defence in murder cases, and the matter was referred for further consideration and had not come before the Committee since. The conclusions of the committee were:

> The case for the introduction of the defence of irresistible impulse is weighty but it cannot be regarded as conclusive. While an attempt has been made in the foregoing to state such case, the Nova Scotia Sub-Committee is not prepared upon the basis of the enquiries it has made, to recommend in favour of the defence or to go further than to recommend additional study preferably by legal in co-operation with medical experts. The attitude of modern psychiatrists suggests that, if a revision of the Rules is contemplated, it may be desirable to consider even wider changes. If it were decided to adopt the defence, it is submitted that proof beyond reasonable doubt should be required. This would, however, have the undesirable effect of introducing two standards of proof in relation to insanity but it appears to be necessary.

The following wording was suggested:

> (19) (now 16). (1) No person shall be convicted of an offence by reason of any act done or omitted by him when labouring under natural imbecility, or disease of the mind, to such an extent as to render him incapable of appreciating the nature and quality of the act or omission, or of knowing that such an act or omission was wrong, or when the act was done or omitted under an impulse which such person was, by reason of natural imbecility or disease of the mind, deprived of any power to resist.
>
> (2) Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved.
>
> (3) Every one shall be presumed not to have acted under any impulse which he was by reason of natural imbecility or disease of the mind deprived of any power to resist until the contrary is proved beyond reasonable doubt.

Nova Scotia Committee of the Criminal Law Section of the Canadian Bar Association.

P. J. O'Hearn, barrister and solicitor, employed by the Crown as Deputy Prosecuting Officer in Nova Scotia, presented a brief (Exhibit 12) on behalf of the Nova Scotia Committee of the Criminal Law Section of the Canadian Bar Association, in which the following wording was recommended:

> A. Everyone should be held criminally liable for the probable consequences of his intentional conduct (whether act or omission) unless

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(a) it is established to the satisfaction of the court that he is incapable of appreciating the nature or consequences of the conduct, or of knowing that it is wrong; or

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(b) it is established to the satisfaction of the court that he had an honest (although not necessarily rational or reasonable) belief in the existence of a state of facts which, if it had existed, would justify or excuse the conduct; or

esistible pulse

(c) it is established *beyond a reasonable doubt*, that the conduct was caused by an impulse of the mind which he had no power to resist; or

mpulsion fear

(d) it is established to the satisfaction of the court that the conduct was compelled by overpowering fear of immediate death or grievous bodily harm, if he is not a party to a conspiracy or association whereby he is subject to the compulsion; but this clause should not apply where the conduct constitutes an offence of treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm or arson.

B. Where by reason of mental disease or deficiency anyone is peculiarly susceptible to provocation or to irrational impulse, although of a kind which should not palliate the conduct of an ordinary man, he should not be held fully responsible for conduct so provoked, or the result of such impulse.

C. Where anyone is held not responsible, or not fully responsible, for an offence, by reason of mental disease or deficiency, he should, ipso facto, be adjudged criminally insane and be subject to detention and treatment under the relevant provisions. No such person who has committed homicide which is culpable in its nature should be released from detention until it is morally certain that he has been cured.

Faculty of Law of the University of Alberta.

W. F. Bowker, Q.C., Dean of the Faculty of Law of the University of Alberta, submitted a brief (Exhibit 44) on behalf of the Faculty of Law of his University and appeared before the Commission to discuss it. The brief was based on the M'Naghten Rules, and did not take into consideration the difference between the law in England and the law of Canada. It may be summarized by stating that it proposes that, except as to some terminology, the section should remain unchanged in substance but make provision for irresistible impulse. The wording suggested was:

> For the purposes of this section a person is insane when he is in a state of imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of the act or omission or of knowing that the act or omission is wrong *or of preventing himself from doing the act or making the omission.*

Representations of individual members of the bar.

Angelo Ernest Branca, Q.C., is practising as Crown Prosecutor in the City of Vancouver, but his work takes him into the Assize Courts only. He has had considerable experience in defending criminal cases and some experience in prosecuting.

He recommended that the law should be amended to have it conform to the codification of the law as it is in the State of Tasmania, and that there should be a recognition of diminished responsibility in cases of mental disease where there is provocation. Mr. Branca stated:

> . . . if you find the slightest bit of appreciation of the nature and quality of the act, or if you find the slightest degree of knowledge that it is right or wrong, then, strictly speaking, there should be full criminal responsibility.

With respect, we do not think this correctly states the present law. He referred to Sir James Fitzjames Stephen's History of Criminal Law of England, volume 2, page 168, where the author stated that irresistible impulse did come within the M'Naghten Rules, but stated judicial interpretation had indicated otherwise.

S. J. R. Remnant, Q.C., practises as Crown Prosecutor in the City of Vancouver, but his work does not take him into the Assize Courts. He is a lecturer on criminal law at the University of British Columbia, and was asked by the Attorney General of British Columbia, by the Chairman of the Committee on the Administration of Criminal Justice, British

Columbia Section, of the Canadian Bar Association, and by the Faculty of Law of the University of British Columbia, to present a memorandum to the Commission.

The memorandum (Exhibit 24) refers at length to the report of the Gowers Commission. The language of the Canadian law was not discussed as distinct from the English law. He was in favour of the alternative recommendation of the Gowers Commission, which endorsed the suggestion contained in paragraph 317 of its report, which agreed that the M'Naghten Rules should not be abrogated but should be amplified, as indicated in paragraph 317, as follows:

> 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.

Maxwell Cohen is a professor of law at McGill University, but not a professor of criminal law, and did not present himself as an authority on criminal law. He spoke on behalf of the John Howard Society. He filed a brief (Exhibit 26) in which it was submitted that the psychiatrist was hampered in court and unable to tell the whole truth. His submission was that expert medical advice should be sought by the court, and there should be a report to the court from a panel of experts set up by some such official or unbiased body as the Royal College of Physicians of Canada. He recommended the Briggs Law of Massachusetts for consideration.

He recommended that the criminal law should recognize mental disease as a defence and should not attempt a definition of mental disease beyond the mere statement in the Code providing for mental disease or mental impairment or irrationality as a defence. At the same time the M'Naghten Rules could be retained, with the accused having the option to plead them or alternatively to plead the new rules providing for limited or lessened responsibility.

> Mr. Cohen put his submission this way: Where the accused person is fit to stand trial, then the accused shall stand his trial on the issues of fact, and the findings of the panel about his earlier mental impairment at the time of the offence, as well as his potential "irrationality" for the future, shall permit a conclusion by the judge and/or jury of a condition of lessened or limited responsibility, or in special cases *of no responsibility*. In cases of lessened or limited responsibility, the sentence would reflect the need for a "humanistic-therapeutic" approach to punishment. The viewpoint in sentencing the person so found "guilty" would be more therapeutic than penal, and might require permanent committal to an appropriate institution or at least for the duration of the illness.

In case the accused person has been mentally ill but is not ill at the time of the trial, the sentence should reflect appropriate supervisory measures such as periodic psychiatric examination if found guilty.

Dollard Dansereau, Q.C., a member of the bar of the Province of Quebec for nineteen years, acted as Crown Prosecutor for nine years, and is now engaged in private practice. He opposed leaving such a highly technical case as insanity to a jury, and submitted that it should be declared to be a matter of law.

The Hon. Antoine Rivard, Q.C., Solicitor-General for the Province of Quebec, made the following submission:

> I think that when a technical question, a scientific point, is raised, as to which the Court or the jury is not supposed to have technical or scientific knowledge, first of all that scientific point, that scientific question, should be, with the help of Crown counsel, defence counsel and the Court, drafted as a definite question on which the Court wants to have scientific light. Then there should be in each province, and perhaps in each district, a list, which could be drafted by the medical profession, the universities and the Department of the Attorney-General, of medical men who were recognized by these three authorities as being real and authoritative experts. When such a question is raised, and when it is drafted in definite terms, the Court would ask the Crown to pick from that list one expert, the defence would pick another, the two would appoint a third, or if they could not agree on the third the Judge would appoint the third. The specific

question would then be put to the experts, the experts would work outside of Court, making all necessary research and examinations, and their report to the Court would be a majority opinion or a unanimous opinion, and that would be the scientific opinion which would help the Court and the jury to decide.

Francis de B. Gravel, who did not profess more than a very limited experience in the practice of criminal law, recommended that anyone who can prove any degree whatsoever of mental deficiency should be entirely excused from the criminal consequences of his act. The accused person should show that his act was the result of his mental deficiency. He would favour a law defined as follows:

> Unless you believe beyond a reasonable doubt either that he was not suffering from a diseased or defective mental condition, or that the act was not the product of such abnormality you must find the accused not guilty by reason of insanity. He would still be responsible for his unlawful act if there was no causal connection between such mental abnormality and the act.

Raymond Maher, whose experience in this field was also limited, recommended that the word "insane" be deleted and replaced by "mentally incapable"; that subsections (2) and (3) be deleted; and that the word "sane" in subsection (4) be replaced by "mentally capable".

He stated that under the present procedure it was futile to raise the plea of insanity, and that the trial of the two issues of guilt and insanity at the same time puts the defence in an impossible position.

Norman Borins, Q.C., eleven years Assistant Crown Attorney in the City of Toronto and County of York, now engaged in private practice, modestly disclaimed any special knowledge of the matter, and did not feel qualified to speak on the subject. However, it was submitted that there should be an abrogation of the M'Naghten Rules.

> Abrogation of the M'Naghten Rules would require more careful and more expert examination of accused persons so that all relevant facts may be adduced in evidence to enable the Magistrate, the Judge and the Jury to determine the broad question — should the accused be relieved of criminal responsibility because of his or her mental condition—the consideration of the question being freed of the rigidity associated with a strict interpretation of the M'Naghten Rules.

Mr. Borins stated that he personally would favour the enlargement of the M'Naghten Rules to include the recommendation of the British Medical Association in preference to or as an alternative to abrogation.[1]

As against the recommendations of these witnesses, we have the evidence of many witnesses who have had very wide and long experience in the administration of the criminal law.

H. Alan Maclean, Q.C., Deputy Attorney General for the Province of British Columbia, has been associated with the Department of the Attorney General for twenty years, has prosecuted a number of cases in which the defence of insanity has been raised, and has read the transcripts of evidence in cases in which the defence was raised and a great many others.

It has never come to his attention that a trial judge has interfered with a psychiatrist, alienist or medical practitioner in the submission of his evidence with regard to mental symptoms. He never heard of Crown counsel objecting to evidence which could go to prove mental disease, as some witness had suggested.

He discussed the question of irresistible impulse:

> The difficulty about the whole matter is in working out a formula which would relieve from criminal responsibility those who are not deserving of punishment, and which at the same time, would not exempt from punishment those to whom punishment would be a deterrent, and who in the interests of the state, should be punished.

If a change is to be made, he prefers the recommendation in the memorandum of dissent to the Gowers Commission, at pages 285-287 of the report. The addition of the defence of

[1] Vide p. 38.

irresistible impulse would leave the question of whether the impulse was irresistible or unresisted to be decided almost wholly on the evidence of experts. The witness felt this would present great difficulty in those parts of Canada in which the services of competent experts are not obtainable, and without additional safeguards it would lead to abuses that would prejudice the whole administration of justice.

Joseph McKenna, Q.C., has been in private practice since 1920, and has acted as Agent of the Attorney General of Alberta. He never conducted a defence where a plea of insanity was advanced. He is firmly opposed to any change in the law as it now stands. He further felt that it would be dangerous to delete subsection (3).

Eric Pepler, Q.C., a former Deputy Attorney General of the Province of British Columbia for twenty years, and past Chairman of the Criminal Law Section of the Canadian Bar Association, has been involved in a great many cases in which the defence of insanity was raised. He is much opposed to any change in the present rules:

> I think the minute you start bringing in anything else by way of rider or proviso to that rule you are going to let yourself in for a great deal of trouble, both in explaining the law to the jury—I think it would be a great mistake. The rule now has stood the test of time for a great many years, and nobody yet has been able to produce a satisfactory alternative that I have seen. For that reason I think the rule should be kept as it is.

T. G. Norris, Q.C., has practised law for forty years, is a Bencher of the Law Society of British Columbia, and has been engaged in a large number of capital cases on behalf of the Crown and has defended certain cases.

He could not say that there was any test which could be applied other than the test provided by the M'Naghten Rules.

> After all, the test must be a layman's test; that is, a test which is understood by juries.
>
> Unless you have a layman's yardstick, then I think the thing gets into a state that there is no hope of seeing that justice is administered as it clearly should be in this country.

W. C. J. Meredith, Q.C., Dean of the Faculty of Law of McGill University, has studied and written on the subject, and has come to the conclusion that it would be preferable to leave section 16 of the Code as it is.

While in his view leaving the field not covered by the rules to the royal prerogative of mercy is not a perfect solution of the problem, he believed that it was safer than to recognize a defence such as irresistible impulse, which might provide criminals with an easy escape from justice. Mr. Meredith's submission was that if the defence of irresistible impulse is to be introduced, it should be proved beyond a reasonable doubt, as is required in the State of Pennsylvania.

As to the New Hampshire law, which we shall discuss later, the witness stated:

> Well, to have no test at all, assuming you are going to retain juries, and I would hope that that would be the last thing we would give up—assuming you are going to retain juries and have no test whatever, the Judge would be in an impossible position. He would not know what to say to the jury in directing them.

Noel Dorion, Q.C., is Chief Crown Attorney in Quebec City, and has been Professor of Criminal Law at Laval University for three or four years. His opinion was that the defence of irresistible impulse would tend to "open the door to allow an appreciation of the individual's will", and would be extremely dangerous.

> So I believe that with the provisions of the existing Criminal Code, and with a moderation that can be brought to bear by the executive after examining the file carefully or even after hearing experts, I believe that thereby we bring moderation to the severity of the test of Section 19.

He stated, however, that the decision as to the issue should be made by the judge, and that a defence that would involve whether the accused had the will to commit the act would

> . . . throw the door wide open; and I am convinced that there are very few defences of insanity, provided there is the slightest ground, which would not succeed, and this would be to the great detriment of justice.

William B. Common, Q.C., has been Director of Public Prosecutions in the Department of the Attorney General for Ontario since 1945, and has been employed in the Department since 1926. Mr. Common's position entails the responsibility for the enforcement of the criminal law throughout the province. He has had wide experience in prosecuting in capital cases, and since 1940 has been engaged largely in appellate work, handling the majority of the criminal appeals. While engaged in appellate work he has been required to read nearly all the records in appeals in capital cases.

He is firmly opposed to any change in section 16. He thinks it would be dangerous to delete subsection (3), as in his opinion there are cases that from the legal point of view come squarely within subsection (3), and he feels that no harm would be done by retaining it.

T. F. Forestell, Q.C., has been Crown Attorney for the County of Welland since 1947; was previously engaged in private practice; and has been a member of the bar since 1920.

He submitted that the law as it now stands is reasonably effective if its purpose is to attain justice. He stated that the present Code had worked extremely well, and that he did not think a jury has any difficulty when properly instructed.

G. A. Martin, Q.C., a member of the bars of Ontario and British Columbia, is exclusively engaged in the practice of criminal law and as teacher of criminal law at the Osgoode Hall Law School. From the point of view of experience and ability, both at trial and on appeal in criminal cases, Mr. Martin has an outstanding record. He stated:

> With considerable doubt and after a good deal of hesitation, I have come to the conclusion that I would not be in favour of abolishing the present rule for determining criminal responsibility where insanity is alleged as a defence, subject to one or two observations I intend to make later by way of qualification. I hope the qualifications are not sufficiently wide completely to destroy my original statement.

He suggested that "disease of the mind" should be changed to "disorder of the mind", because it might be suggested that "disease of the mind" required proof of some pathological change in the brain cells. He discussed the interpretation of the word "wrong", which will be referred to later. He stated that he knew of no case in which an improper verdict had been rendered by reason of the wording of the section.

> It seems to me that if the provisions of Section 16 of the Criminal Code are interpreted sufficiently broadly along the lines that Sir James Stephen suggested they should be interpreted, most genuine cases of irresistible impulse would be covered by Section 16. If a person was so overwhelmed by an impulse, or was so disturbed mentally that he could not focus his mind on those things which would govern or guide most people in determining the rightness or wrongness of the act, then he should be held irresponsible; but I am afraid that again the judicial interpretation placed upon the M'Naghten Rules which, by and large, are followed in Canada, has perhaps gone to such an extent as to exclude that type of thing from the scope of Section 16, although there are undoubtedly judicial opinions to the effect that, while irresistible impulse is not *per se* a defence, it is perhaps very cogent evidence that the accused may not at the time of the doing of the act have appreciated that it was wrong.

He stated that he did not know of any case in Canada which had not been covered by section 16 where the situation really existed.

> He thought the word "appreciate" tends to broaden the scope of section 16.
>
> If he could not appreciate, that is foresee or measure the consequences of what he was doing in the same way that a sane or normal person might, he might be freed from responsibility under Section 16. It would tend to rebut the usual presumption that a man intends the natural consequences of his acts.

With reference to irresistible impulse caused by disease of the mind, Mr. Martin was asked:

> Q. . . . if the word "appreciate" is properly applied, would it not pretty well comprehend the case?
>
> A. My thought is that properly applied it would, Mr. Chairman, and certainly I feel that the second branch of sub-section (2) would cover the situation, again properly interpreted, because a person overwhelmed by an irresistible impulse so overpowering

as that supposes, surely is not in a condition to be able to have present in his mind the considerations which make the act right or wrong. That is why I expressed myself at the beginning by saying that I thought that, broadly interpreted, the rules should be retained and need no additional amendment or additional qualification; but if the trend of judicial authority precludes that wider interpretation I am speaking about, then undoubtedly I would be in favour of having Section 16 amended. The matter has not remained free from doubt perhaps, I think, on the authorities.

John J. Robinette, Q.C., has had very wide experience in the practice of criminal law. Prior to entering private practice Mr. Robinette was on the staff of the Osgoode Hall Law School in Toronto and taught criminal law. He has defended a substantial number of persons charged with capital offences, but in only one case did the defence of insanity arise, and in that case it was not contested; the accused person was unfit to stand trial.

Mr. Robinette disclaimed any special knowledge on the subject, and made it clear that he submitted his views from an academic point of view. He said:

> However, my views as to the substantive law basically are that the rules in M'Naghten's case, as substantially incorporated in the Criminal Code, are basically sound, not as a test of insanity, but as a test of criminal responsibility. I think much of the controversy on this subject has been due to the fact that it has been assumed that the Criminal Code purports to define insanity. It really does not do that at all; it merely purports to define under what circumstances a man shall not be held criminally responsible for his acts. Now with that general observation in mind, it seems to me that it might be worthy of consideration to exclude from the Code entirely the word "insanity", and what is now Section 16 should merely provide that under certain circumstances a person shall not be criminally responsible for his acts or omissions, leaving out any reference to insanity, because I think that that is probably what causes some of the controversy between the medical profession and the legal profession. After all, the Criminal Code is designed to protect the public, and the theory of Section 16 is that it excludes those persons who are not responsive, having regard to their mental condition, to the deterrent features in the criminal law.

Mr. Robinette felt that subsection (3) should be left as it is. He said:

> My general approach to the whole problem is that, basically, it has worked well, and that subject to clarification of some of these matters that we have discussed, the general principles ought not to be changed.

The matters to which Mr. Robinette referred involved the interpretation of the word "wrong", whether "morally wrong" or "legally wrong" should be the interpretation. This will be discussed later. However, he suggested that if there is a redrafting of section 16 it should deal with exemption from criminal responsiblity and should not be confined to consequences that flow from natural imbecility or disease of the mind. It should apply to consequences that flow from mentality generally or mental conditions. He referred to sleeplessness and worry.

William O. Gibson, Q.C., Crown Attorney for the City of Toronto and the County of York, has been employed in the Crown Attorney's department for twenty-five years, and has had a very extensive experience in the prosecution of capital cases.

He has never felt any injustice has been done under the present law. He considers that it has worked fairly to the accused person.

H. H. Bull, Q.C., Assistant Crown Attorney for the City of Toronto and the County of York, has prosecuted many capital cases and perhaps thousands of other cases. In only two was the defence of insanity raised. In quite a number fitness to stand trial was in issue. He submitted

> . . . that Parliament should exercise caution in making any change in the law which would affect only a few individuals at the expense and risk of materially altering if not destroying a well established body of jurisprudence unless it can be shown that substantial injustices have occurred. This has not been my experience.
>
> It is submitted that the present substantive law of insanity embodying the M'Naghten Rules is an adequate legal standard of criminal responsibility and should not be extended. . . . the statement of the law should remain in its present terms.

It is further submitted that the concept of irresistible impulse should not form part of the substantive law of insanity. It may however have a bearing on the ultimate disposition of the offender.

T. J. Rigney, Q.C., has been in the practice of law for fifty-seven years, and has been for many years Crown Attorney at the City of Kingston.

He recalls no miscarriage of justice by reason of too strict an application of the present law. He is in favour of leaving subsection (3) as it is. In his opinion the test under section 16 is satisfactory in practice and theory. He considers section 16 superior to the New Hampshire law or the District of Columbia rule, which we shall later discuss.

When all the evidence is thoroughly digested and considered in the light of the fact that we sought to gain an expression of opinion from all available sources of informed opinion in Canada, there does not appear to be any reason to conclude that there exists any widespread dissatisfaction with the law as it is now and is now administered, and those who expressed dissatisfaction had not considered the fact that the Canadian law must receive a much broader interpretation than the English law. It cannot be said that these witnesses had considered the word "appreciate" or the provisions of the Interpretation Act as related to this word and the word "wrong". There is, however, a great weight of opinion from judges, lawyers and doctors in favour of no substantial change.

CHAPTER VII

ALTERNATIVE SUGGESTIONS

Notwithstanding the evidence with respect to the law and its administration in Canada, we considered that we should examine with care any suggested changes to determine whether they would make for better administration of justice in Canada. .

Irresistible impulse related to disease of the mind.

The suggested amendments put forward most frequently were to amplify the present law by incorporating in it words that would render it a defence where the accused was, "as a result of disease of the mind, incapable of preventing himself from committing the act". These recommendations were based on the recommendations of the British Medical Association to the Gowers Commission, (para. 264, p. 92), and the alternative recommendation of the same Commission (para. 317, p. 110). This is similar to the language suggested by Mr. Bowker, but he adds the words "or of making the omission", which must necessarily be part of any definition of criminal responsibility in this country. This suggested amendment is not to be confused with what is popularly known as a defence of irresistible impulse. The witnesses supporting the suggestion go no further than to recommend that the irresistible impulse should be proven to be a result of disease of the mind. Some witnesses submitted that the defence should be made out if a reasonable doubt was created in the minds of the jury that the accused may have not acted under an irresistible impulse that was the result of disease of the mind. There was strong medical and legal evidence against extending the section as suggested.

If the issue of criminal responsibility is to be decided by a jury, as we think it should be, the suggested amendment would open up two very wide fields of uncertainty — (1) whether in a given case the impulse was irresistible or unresisted; and (2) whether the impulse was the result of disease of the mind. In this view we are supported by very experienced medical witnesses. On the other hand, we think if the present law is understood and applied as we think it should be understood and applied, the views expressed by Sir James Stephen already referred to apply with much greater force to the Canadian law, and where by reason of disease of the mind the will is so overpowered that a person is powerless to resist committing an act the present wording of subsection (2) affords a good defence. No witnesses have brought to our attention any case that has come before the courts of Canada of such a nature that a good defence could not be made out under the present law. As we have said, it is not to be overlooked that the test is not applied to a condition before or after the act, but at the immediate time the act is committed, which is of great importance in considering the criminal responsibility of an accused person.

Upon the most careful reflection, we have come to the conclusion that, notwithstanding what may be the experience in other countries, there is no well informed opinion or condition in Canada, judged in the light of the evidence before us, to warrant a change in the law so as to incorporate the suggested defence of irresistible impulse related to mental disease.

The Law of the State of New Hampshire and the Law of the District of Columbia (a State and a District in the United States of America).

There was some discussion before us, but it was suggested by only a few witnesses that the present section of the Criminal Code should be repealed and a statute passed to adopt for Canada a law similar to the law of the State of New Hampshire, which has been substantially adopted by judicial decision in the District of Columbia.

These laws are not statute laws, but derive their authority from judicial decision. The New Hampshire law has been in effect since 1871.[1] The United States Court of Appeals for

[1] State v. Pike (1869), 49 N.H. 399.
State v. Jones (1871), 50 N.H. 369.

the District of Columbia Circuit rendered a decision in 1954,[1] declaring that the formulation of tests of criminal responsibility was entrusted to the courts, and in adopting a new test the court invoked the inherent power to make a change prospectively.

In effect in these states all legal rules governing tests of criminal responsibility are abandoned and the matter is left to the jury to decide whether the accused had the capacity to entertain a criminal intent, whether in point of fact he did entertain such intent, or the test may be summarized more concisely by saying, was the accused suffering from a mental disease at the time he committed the act, and was the act the product of the mental disease?

We communicated with the Chief Justice of New Hampshire, and he has advised us that in his opinion the law in that state has functioned satisfactorily. The law of New Hampshire must be considered in the light of the fact that the problems involved in administering the criminal law in a substantially rural community are very different from the problems involved in administering the law in a nation of Canada's size and diversity of conditions. During the six-year period from 1949 to 1954 inclusive (the only period for which these statistics are available) there has been in Canada a yearly average of 42.8 persons charged with murder, 17.1 convictions, 22.0 acquittals, and 3.7 detained on account of insanity. In New Hampshire in the last 30 years there have been in all 55 indicted for murder; 46 were convicted of murder in first or second degree; 7 were acquitted on account of insanity; none were found unfit to stand trial on account of insanity. At the end of 1953 the total population of New Hampshire was 527,000. In any comparison of the operation of the law of New Hampshire with that of Canada consideration must be given to the fact that in New Hampshire the law defines degrees of murder, and by section 4 of Chapter 45 of the Revised Laws provides:

> The punishment of murder in the first degree shall be death or imprisonment for life, as the jury may determine. . . . if the jury shall find the respondent guilty of murder in the first degree, the punishment shall be life imprisonment unless the jury shall add to their verdict the words, with capital punishment.

The Federal criminal law, which applies to the District of Columbia, in Section 1111 (b) of Title 18 (Revised) of the United States Code, provides:

> Whoever is guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto "without capital punishment", in which event he shall be sentenced to imprisonment for life;.

To those who are familiar with the practical administration of justice in Canada it is at once apparent that a law governing criminal responsibility where the result of the verdict is in the hands of the jury cannot satisfactorily be compared with a law where the jury has no part in determining the result of the verdict.

In the District of Columbia since the decision in the Durham case eight capital cases have been tried, in two of which the accused were charged with rape and in six with murder. The following were the results: verdict of guilty of murder as indicted, two; guilty of second degree murder, two; not guilty by reason of insanity, one; not guilty, one. In the two cases in which rape was charged, a verdict of guilty with a recommendation of death penalty was returned in one case, and in the other case a verdict of assault with intent to commit carnal knowledge was returned. The population of the District of Columbia at the 1951 census was 802,178.

We do not think that any sound conclusions can be drawn from the experience in either the State of New Hampshire or the District of Columbia, and statistics, and particularly percentages based on statistics, are not a reliable basis for judgment, having regard to the small population and an entirely different system of administering the criminal law as applied to capital cases.

That a law which lays down the legal test of criminal responsibility in terms of whether the accused is suffering from a disease of the mind and whether the act for which he is charged is the product of the disease of the mind, would present difficulties, is apparent on analysis. If the act or omission is the product of the mind, it necessarily is the product of the diseased

[1] Durham v. U.S. (No. 11859) 214 Fed. Rep. 2d, No. 6, p. 862.

mind, and if the provisions of the Interpretation Act are applied the resultant test will be, did the accused have a disease of the mind? If that question is decided in the affirmative the defence must necessarily be made out, as any positive act or any omission that is produced by the mind is the product of the diseased mind. It is quite apparent that the adoption of such a defence as part of the statute law of Canada would open up wide avenues of forensic debate. If the test were, "Did the accused suffer from mental illness at the time the act was committed, and was the act a product of mental illness?" it would open up a still wider field for forensic debate, involving a definition of mental illness, a subject about which there is considerable difference of medical opinion. We think that this would add much to the confusion of lay juries.

There is little, if any, evidence before us which suggests that the administration of justice would be improved by having no legal tests of criminal responsibility. On the other hand, there is a great weight of evidence, both medical and legal, that we should have definite rules by which legal responsibility is to be tested. We think that a change in the law by the adoption of the law of New Hampshire or the law of the District of Columbia would only add to the confusion that some witnesses stated now exists. The result would be to leave the jury with no legal guidance and leave the matter in many cases to be decided by the persuasive ability of the psychiatric witnesses and counsel. We are not convinced that any criticism we have heard of our law as it now is and is now administered warrants such a drastic change in the fundamental concept of criminal law in Canada, which is that it should be simple, clear and easily understood by a lay jury.

The New Hampshire rule as further expounded by the Court of Appeals of the District of Columbia was not adopted by the Gowers Commission, and we have not been informed that it has been adopted in any other country administering law of British origin.

The American Law Institute, which has an Advisory Committee composed of thirty-five members drawn from the judiciary and the legal and medical professions in the United States of America, has undertaken to draft a model penal code. It has considered and rejected the Columbia rule. The draft of the article dealing with criminal responsibility presented for the May meeting of 1955 was as follows:

ARTICLE 4. RESPONSIBILITY

Section 4.01. Mental Disease or Defect Excluding Responsibility.

(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) The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

* * *

Alternative formulations of paragraph (1).

(a) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect his capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible.

(b) 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 to appreciate the criminality of his conduct or is in such state that the prospect of conviction and punishment cannot constitute a significant restraining influence upon him.

Whatever may be the views of those in a country where many of the provisions of the criminal law are substantially different from our criminal law, we do not think the suggested draft would make for an improvement of the administration of justice in Canada. We think the main proposal as distinct from the alternative proposal (Section 4.01) has many

features of our law as presently interpreted and applied, but has the defect of having no jurisprudence to support it and would be much more difficult to present to a jury. The alternative suggestions have greater weaknesses than the main one; each one of them leaves to the jury little guidance, and we think the result would impair the uniformity of justice.

We therefore conclude that when the provisions of the Interpretation Act are applied to subsection (2) of section 16 it constitutes the best definition of criminal responsibility that we have been able to find. We think if an accused person has mental capacity to foresee and measure the consequences of the act he committed he should be held criminally responsible, unless by reason of disease of the mind he did not know that the act was morally wrong in the sense that it was something that would be condemned in the eyes of his fellow men.

CHAPTER VIII

SECTION 16 AS REVISED IN 1955

The revision of the Criminal Code which came into force on April 1, 1955, made certain changes in the former section 19 which we do not believe were intended to change the law, but the meaning of which may be obscure. Subsection (1) reads:

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

No such wording appeared in section 19 of the former Code, although subsections (2) and (3) of section 16 constitute a legal definition of the word "insane" as used in subsection (1). We think the wording of the section as it was formerly was less objectionable from a medical point of view.

Another change was made in the wording which we think was unnecessary. The effect of the change can best be comprehended by setting out the two relevant subsections in full. Subsection (1) of section 19 in the former Code read:

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

Subsection (2) of section 16 of the new Code reads:

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

The change of the italicized word "the" to "an" and the omission of the word "such" in the new Code may create some argument as to the intention of Parliament. The question that at once arises is, why was the change made? It has been suggested that under the new Code the test of responsibility is not to be related to the act which is the subject matter of the charge. We do not think that Parliament intended that where there is proof of some mental disease or natural imbecility the mental capacity to understand the nature and quality of all acts within the range of the human mind should be the legal test of responsibility. We feel confident that the courts will interpret the subsection as referable to the act which is the subject of the charge.

While the language used in the amended section is not commendable, if the section is not to be redrafted for other reasons we do not recommend any amendment to the section, unless the courts interpret the questioned words of the subsection as referring to acts in general rather than to the act which is the subject of the charge. In such case the former wording should be restored.

CHAPTER IX

BURDEN OF PROOF

Some representations were made to us that the burden of proof should be altered so that when the issue of insanity is raised or there is some evidence of mental disease the onus should be on the Crown to prove that the accused person was not insane within the legal definition. We do not feel that the evidence we have heard warrants a recommendation of any change in the law in this respect. The onus on the accused to establish the defence by a mere preponderance of probability is not a heavy onus. We think that if there is not in the minds of the jury "a mere preponderance of probability" that the accused is insane, the defence ought not to prevail. It is also to be remembered that if one juryman is satisfied that that standard of proof has been established, the accused cannot be found guilty of the offence charged.

On the other hand, to lay on the Crown an onus to prove the accused sane beyond a reasonable doubt, as has been suggested, or on a preponderance of evidence, is not consistent with the principles of the administration of justice that we have inherited, and no evidence we have heard warrants such a change.

CHAPTER X

SUBSECTION (3) OF SECTION 16

In our consideration of the substantive law we have directed our minds mainly to subsection (2). There remains to be considered subsection (3). The preponderance of medical evidence condemned the wording of this subsection on the ground that it describes a person who could not exist. The opinion of these witnesses was that no one who has "specific delusions" could be "in other respects sane". We think that from a medical point of view the arguments put forward in support of this opinion are conclusive. The medical evidence convinces us that any defence that could be raised under subsection (3) could be successfully raised under subsection (2), and that subsection (3) is unnecessary. We feel that if the jury consisted of medical men this would be true. Some medical witnesses, and the preponderance of the evidence of the legal witnesses, were against eliminating the subsection. They pointed out that in practice it brought home to jurors a condition that could be more easily established under the present language of subsection (3) than under the general language of subsection (2). It was emphasized that a person might suffer from a specific delusion as a result of a disease of the mind coming within subsection (3) and in all other respects appear to be sane. It was emphasized, particularly by legal witnesses, that if such a person were left to make out a defence under subsection (2) much evidence would indicate normal behaviour in all other respects which might be misconstrued by the jury as being evidence that the accused suffered from no mental disease.

We have come to the conclusion, but not without some hesitation, that, in view of modern psychiatric knowledge, the subsection can well be dropped from the law, and that any legitimate defence that could be raised under that subsection can be raised under subsection (2).

CHAPTER XI

APPEALS

Our attention has been drawn to the provisions of section 592 (1) (d), which reads as follows:

> 592. (1) On the hearing of an appeal against a conviction, the court of appeal . . .
>
> (d) may quash a sentence and order the appellant to be kept in safe custody to await the pleasure of the Lieutenant-Governor where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was committed or the omission was made, so that he was not criminally responsible for his conduct.

This section was taken from the English Criminal Appeal Act, 7 Edw. VII, ch. 23, sec. 5, subsec. 4. In England the verdict is "guilty but insane". If on any appeal it appears to the Court of Criminal Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial and order the appellant to be kept in custody as a criminal lunatic under The Trial of Lunatics Act, 1883, in the same manner as if a special verdict had been found by the jury under that Act.

When the court of appeal in Canada acts under section 592 (1) (d) the verdict of guilty stands, but the order that the condemned person be kept in safe custody to await the pleasure of the Lieutenant-Governor is substituted for the sentence. This is inconsistent with a verdict rendered under section 523, under which the accused person is declared to be "acquitted on account of insanity". It is also inconsistent with the whole concept of Canadian law, under which no one should be found guilty of a criminal offence who is not criminally responsible according to the definition of criminal responsibility contained in the Criminal Code.

Another effect of the wording of this section is to deprive the Attorney General of a right of appeal to the Supreme Court of Canada against the order of the court of appeal in such cases. Under the law as it now is, the Attorney General may appeal to the Supreme Court of Canada only on questions of law under the conditions set out in section 598, when a conviction has been set aside by the court of appeal under section 583 or when the acquittal of a person is sustained by the court of appeal under section 584. We think that, in the interest of consistency and uniformity of jurisprudence in Canada, section 592 (1) (d) should be altered to read:

> (d) may, where it is of the opinion that, although the appellant committed the act or made the omission charged against him, he was not criminally responsible for his conduct, quash the conviction, acquit the appellant, declare that he is acquitted on account of insanity and order him to be kept in safe custody to await the pleasure of the Lieutenant-Governor.

We think that it is of paramount importance that the Attorney General of a province should have the right to appeal to the Supreme Court of Canada in such cases, to ensure complete uniformity of the law as administered throughout Canada.

CHAPTER XII

MENTAL CONDITION RELATED TO PROVOCATION

Section 203 of the Criminal Code provides that culpable homicide which otherwise would be murder may be reduced to manslaughter if the person who committed it did so in the heat of passion caused by sudden provocation. For the purpose of discussing the representations that have been made to us, subsection (2) is the important part of the section. It reads:

> A wrongful act or insult that is of such a nature as to be sufficient to deprive an ordinary person of the power of self-control is provocation for the purposes of this section if the accused acted upon it on the sudden and before there was time for his passion to cool.

Some submissions were made that, where the accused person suffered from some mental disease, the degree of provocation sufficient to reduce the offence from murder to manslaughter should be measured by the mental condition of the accused person, not by what would be sufficient to deprive the ordinary person of the power of self-control.

To extend the law as has been suggested would open up a wide speculative field. It would create a different measure of provocation for each accused person when mental disease was in question. In fact, in such cases it would in a measure reverse the test as it now is. Under the present law, the jury must determine as a question of fact the extent of the provocation and measure it by the power of the ordinary person to exercise self-control. The jury then proceeds to consider whether the accused person in fact acted in the heat of passion, on the sudden, and before there was time for his passion to cool. In the last consideration the mental condition of the accused person, by reason of disease of the mind or any other circumstance, is a fact that must be considered.[1] If the suggested change were adopted the jury would consider first what the mental condition of the accused person was and then proceed to consider whether the provocation would be sufficient to cause that particular accused person in his particular mental condition to lose his power of self-control. The suggested amendment is analogous to the law of Scotland, which recognizes the law of diminished responsibility; and it is not to be overlooked that under the law of Scotland the onus is on the accused person to prove to the satisfaction of the jury on the balance of probability that when the offence was committed his mental state was unsound, that he was in a state of mental aberration and not fully responsible for his actions.[2] On the other hand, if section 203 were amended to give effect to the suggestion put before us, all the accused person would be required to do would be to raise the question in evidence, and the Crown would have to prove beyond a reasonable doubt that the provocation was not such as to deprive the accused person of his power of self-control, and this would involve proving beyond a reasonable doubt that he was not suffering from mental disease. We think that to place such a heavy burden on the Crown would open up in the administration of the law avenues of difficulty not contemplated. We feel that if the defence of diminished responsibility is to be recognized at all it should be recognized in all cases.

An impressive argument against the adoption of the principle of diminished responsibility where insanity is raised as a defence is that the conviction is for a lesser offence and the prisoner is sentenced to a penal institution for punishement where he will likely receive no treatment. In all probability he will ultimately be released whether his capacity to assume social responsibility and to observe the laws is improved or not. The concept of diminished responsibility confuses two things — criminal responsibility giving rise to punitive action and criminal irresponsibility giving rise to custodial care attended by medical treatment. On the administrative level this confusion can be satisfactorily resolved, but we do not think it can be satisfactorily resolved in the courtroom.

[1] R. v. Taylor, 1947 S.C.R. 475.
[2] Gowers Report, p. 131 and p. 393.

CHAPTER XIII

MENTAL EXAMINATION OF ACCUSED PERSONS PRIOR TO TRIAL

Much of the criticism of the present law and procedure arose out of what was said to be the undesirable effect on the public of the open conflict of expert witnesses in the court-room. Whatever may be the experience in other countries, we think much of this criticism is overstated as it applies to Canada. In some provinces the Crown psychiatrists are relied upon by the defence and often called as witnesses by the defence. Psychiatrists of long experience stated that when a psychiatrist had given an opinion to the Crown authorities it was seldom that another psychiatrist had been brought in to testify. We have had no complaint from members of the bar that psychiatrists who have examined accused persons on behalf of the Attorney General have a biased point of view. We think, however, that a more uniform practice throughout the provinces for the mental examination of accused persons, and particularly those charged with capital offences, would resolve many of the difficulties that are said to have existed in the past.

The only judicial authority to order an accused person to be confined for mental examination is contained in section 451 (c) of the Criminal Code, with which we have already dealt.

The practice in the different provinces of Canada with regard to the mental examination of those charged with capital offences is not uniform. In some provinces the practice is to have the accused person examined by at least one psychiatrist, and sometimes two, in all capital cases; in some cases there are three examinations, one immediately on arrest, another some time later, and one immediately before the trial. While this is more in the realm of administration of justice in the provinces, the responsibility for which lies in the provinces, rather than criminal procedure, we respectfully suggest that this is a procedure that is commendable and should be uniform throughout Canada.

Many witnesses recommended that the examination should be compulsory in all cases where a person is charged with a capital offence, and that it take place in a mental hospital. We do not think that such a course would be consistent with the principle that an accused person is presumed to be innocent. It is a violation of very basic principles in our administration of justice that an accused person should be compelled by law to subject himself to any sort of examination or interrogation without judicial order. We think that all accused persons have a right to remain silent after arrest unless they wish to be interviewed. Our attention has not been drawn to any case where examination of the accused by psychiatrists, when it was considered advisable, was not accomplished through arrangement or under the provisions of section 451 (c) of the Criminal Code.

We are not in favour of the transfer of all persons charged with a capital offence to a mental hospital for mental examination and observation. This would impose a security risk on the staffs of mental hospitals that is not warranted and is not practicable throughout the whole of Canada. We are, however, much in sympathy with the complaint frequently put forward by medical witnesses, that the gaol cell is not a satisfactory place in which to diagnose a mental condition.

In many provinces whenever there is a suggestion that the course would be advisable, the practice has been to transfer the accused person to a mental hospital for observation and examination by administrative action. We think this course is so frequently followed in some provinces that it ought to commend itself to all provincial authorities. If there is widespread difficulty in the proper examination of accused persons, the same power that is vested in a justice of the peace at a preliminary hearing might be conferred on a judge having jurisdiction to try the alleged offender. In such case there would necessarily have to be some evidence of a mental condition to warrant the order, otherwise it might be used as a pretext to delay the trial or obtain confinement where less rigid security measures were exercised.

Exchange of Medical Reports.

In most of the provinces, when an accused person has been examined by a psychiatrist at the instance of the Crown, a copy of the report is promptly furnished to defence counsel.

Strong representations were made to us that psychiatrists who examine accused persons should meet, either at the time of the examination or later, for the purpose of discussing their findings with a view to presenting as far as possible a unanimous report to the court. We are convinced that the good faith of the Crown is regarded so highly in Canada that it is unlikely that reports of psychiatrists who have examined an accused person at the instance of the Crown will not be furnished to counsel for the accused. In any case where difficulty may arise, the matter may safely be left in the hands of the trial judge without statutory compulsion.

On the other hand, we think that it would be a violation of the principle that an accused person does not have to disclose his defence to make it obligatory that the report of a psychiatrist who has examined him at the instance of the defence should be furnished to Crown counsel. We have had evidence that in many cases this has been done by agreement in order that the true state of the mental condition may be put before the court with as little controversy as possible. We think that, while this is desirable, no law should make it compulsory.

CHAPTER XIV

STATUTORY BOARD OF REVIEW IN CAPITAL CASES AFTER CONVICTION

We have already discussed the statutory right of commutation and the exercise of the royal prerogative of mercy and expressed our conclusion that there should be no attempt made to delineate its boundaries or define rules by which it should be exercised. We think, however, that where the question of the mental condition of a person condemned to death arises in any way the law may well provide for adequate examination by competent psychiatrists to report and advise the executive.

A law which in some measure fulfils this object has been in effect in England since 1884. It reads as follows:

> In the case of a prisoner under sentence of death, if it appears to a Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State shall appoint two or more legally qualified medical practitioners, and the said medical practitioners shall forthwith examine such prisoner and inquire as to his insanity, and after such examination and inquiry such practitioners shall make a report in writing to the Secretary of State as to the sanity of the prisoner, and they, or the majority of them, may certify in writing that he is insane.[1]

While this section purports to deal only with the condition of the condemned person at the time of the examination, it would appear that in practice the report of the examiners goes further than that.

Objection was raised before the Gowers Commission that such an examining body in effect reviewed the verdict of the jury, and if they reported that the person was insane they in effect overruled the decision of the jury. We do not think the objection is tenable, nor do we think that, if the executive considers and gives effect to such a report in deciding that a death penalty should be commuted to life imprisonment, its action in either theory or fact can be taken as a reversal of the finding of a jury. The enforcement of law according to legal rules laid down, and the right of the fountain of justice, the Crown, to be merciful, are not inconsistent but are complementary in the regulation of our society.

Our conclusion is that the practice outlined by Mr. Garson for securing psychiatric assistance in capital cases should be provided for by statute and not left to the decision of the responsible minister. Where insanity has been in issue at the trial, or where the minister has any reason to believe that a person under sentence of death is or may have been suffering from a disease of the mind, statutory provision should be made that the minister shall appoint a board of three psychiatrists to examine the condemned person and report. We do not think the examination should be confined to the mental condition at the time the examination takes place. In addition to considering degrees of mental disease which may not come within the law as defined, evidence might well be available to such a body that could not come before a court under the rules of evidence which must apply in all criminal cases. For example, family history and copies of hospital records are often important, but such evidence in many cases might not be obtainable through channels provided by law, because of poverty or many other reasons, including the difficulty of getting evidence at home or from abroad in such form as to be admissible at the trial. We think such a review would be a humane measure to safeguard against any error that might take place at a trial.

We do not think that the personnel of the statutory body should be the same in all cases, but appointments should be made from time to time to review each particular case. What we suggest would in effect put in more regular form the practice that now exists and inform the public that there is a right of review.

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[1] The Criminal Lunatics Act, Ch. 64 (1884) 47-48 Victoria, s. 2 (4).

CHAPTER XV

RELEASE OF PERSONS FOUND NOT GUILTY ON ACCOUNT OF INSANITY

Mr. Common made strong submissions to us that the criminal law should provide for procedure whereby a person found not guilty on account of insanity should be released if it appeared that he no longer suffered from any mental disease. He agreed, however, that it was not clear that the jurisdiction of the Parliament of Canada extends beyond determining the procedure by which the verdict of the jury or the judgment of the court should be arrived at and making provision for the custody of the prisoner pending the exercise of the provincial jurisdiction. In the ordinary case the court is given jurisdiction to sentence the accused person. Under the British North America Act, if he is sentenced to a penitentiary term, he is a charge of the Dominion; if to a reformatory or gaol term, he is a charge of the province. Where the accused person is found not guilty on account of insanity he is not sentenced but directed to be held in custody pending the pleasure of the provincial government. This recognizes that when the verdict of not guilty in such a case is rendered, the province is the only authority having jurisdiction over the acquitted person. He is in fact declared by judicial process to be innocent of the crime and to have been insane at the time the act which was the subject of the charge was committed, and his custody and treatment are then a responsibility of the province.

It is suggested that the trial judge should be given jurisdiction to hear evidence after the verdict as to the then mental condition of the acquitted person and decide whether he should be committed to a hospital or released. Quite apart from the constitutional aspects of the matter, we do not think that trial judges should be called upon, nor do we think that by their training they are fitted, to decide how persons acquitted on account of insanity are likely to conduct themselves in the future, nor do we think a court is the proper forum in which to determine such a matter. We think this is entirely a medical problem and not a question of law or fact. It is a matter for very specialized clinical examination and opinion. It is a problem that has to be decided by the provincial administrative authorities whenever a person has been confined to a mental hospital because he is thought to be a danger to the public. We can see no reason why the provincial authorities should not assume the same responsibility in those cases in which the dangerously insane person has committed an act of violence as they do when a dangerous person is confined because he may commit an act of violence.

The question, however, is an important one, and, although we do not feel that it is within our terms of reference, we respectfully suggest that the provincial authorities consider some regular review of all cases where persons have been committed after the verdict of a jury, and, if complete recovery can be established with assurance, provision should be made for their release. In the Province of Saskatchewan two committees were set up in 1946 consisting of five members, namely, the local district court judge, depending on the district in which the mental hospital is situated, three psychiatrists and a representative of the Department of the Attorney General. The psychiatrists are the superintendent of the hospital, the clinical director of the hospital, and the Director of Psychiatric Services of the Province. The committee meets once a year at each hospital, and any patient in the hospital who has been found not guilty on account of insanity may ask to appear before the committee. The committee hears evidence as to his mental state, and, if they decide unanimously that he is well and fit to be discharged, that recommendation goes to the Attorney General and to the Lieutenant-Governor, and he is usually discharged. The committee also reviews the case of any patient who is in the hospital who has been declared unfit to stand trial and has not been tried. Since 1946 between thirty and forty cases have been reviewed and about fifteen persons released. We suggest that other provinces consider the procedure adopted in Saskatchewan, but that it should be extended so that all cases where a person has been found not guilty on account of insanity and is confined in a mental hospital should be reviewed at least once a year whether a request is made to appear before the committee or

not. We feel, however, that on the examining board the public should be well represented by psychiatrists who are in no way connected with the government service. Such representation would operate as a protection of those employed in the government service against any suggestion that persons were being unnecessarily detained or being liberated while still potentially dangerous. These views are submitted with great respect, as they apply to a matter of provincial administration and not to a matter to be dealt with by Parliament.

CHAPTER XVI

TERMINOLOGY

The weight of the medical evidence and some legal evidence was in favour of the adoption of terminology which is in current use by the medical profession in diagnosis, treatment and discussion of mental cases. The words in section 16 to which exception is taken are "insane", "natural imbecility" and "disease of the mind". It is said that these are archaic terms. It is, however, to be pointed out again that the language used in section 16 is language used to provide a legal definition of criminal responsibility.

The brief of the Canadian Mental Health Association (Exhibit 6), endorsed by the Canadian Psychiatric Association and many responsible witnesses, recommended:

> Effecting these changes in the Criminal Code would mean the following changes in section 19 (section 16 of the proposed Code):
>
> Subsection (1) — strike out "insane"
> Substitute "mentally disabled"
>
> Subsection (2) — should be rewritten as follows:
>
> > "for the purpose of this section a person is mentally disabled when he is a mental defective, or has a mental illness of a nature and extent which renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong".

It was pointed out that in section 451 (c) (i) the words "mentally ill" appear, and that in section 527 (1) both "insane" and "mentally ill" are used. These sections, however, do not purport to deal with criminal responsibility.

We think that if section 16 were rewritten in accordance with these suggestions it would create much confusion in administration of the law that those who put forward the suggestions do not contemplate.

"*Mentally disabled*" to the lay and legal mind contemplates many conditions which are in no way associated with insanity as the term is popularly understood. It would necessarily encompass temporary conditions such as drunkenness, impairment from overwork, sleeplessness, and conditions arising from physical illness and anxiety. We do not think those who put forward the suggestion contemplated that such conditions should exempt an accused from criminal responsibility, with the attendant results that would follow upon such a person either being kept in a mental hospital or permitted to go free. We feel that public opinion in Canada would not support such a far-reaching change in the law. "*Mentally disturbed*", a term suggested, is open to the same objection as the words "*mentally disabled*".

"*Mental illness*", if substituted for "disease of the mind", would open up an equally far-reaching problem. The opinions of medical witnesses vary greatly as to what is meant by "*mental illness*". Some would extend it to neurosis and some to a psychopathic condition without psychosis, which would make for elaborate forensic debate beyond the comprehension of a lay jury. Although some witnesses criticized the words "disease of the mind" on the ground that a jury might think that it was necessary for the defence to show evidence of some pathological change in the brain cells, we found no evidence that such a difficulty had arisen in practice, and again we feel that an appellate court would not allow a verdict to stand which was the result of a direction by the trial judge that "disease of the mind" is so limited. In the legalistic sense we think experience has shown that the words "disease of the mind" have functioned to express a mental condition quite within the comprehension of a jury of laymen. In fact, they are words that are used generally in other jurisdictions in defining criminal responsibility. We conclude that it is undersirable to change the criminal law by changing mere terms unless the effect of the change can be clearly foreseen. There is much force in what is said in the brief submitted by Dr. Lucy on behalf of the Saskatchewan Division of the Canadian Mental Health Association:

> Although there is something to be said for this line of reasoning a good deal can be argued on the other side. It must be realized that an attempt to replace a term which has unpleasant associations with a euphemism is usually only a short-lived expedient, as in time the euphemism comes to have the same unpleasant associations as the word which it replaced. A good example in psychiatric practice is the word "asylum". Originally meaning a place of shelter, it came to mean a terrifying dungeon full of raving animal-like humans living in squalor and degradation. So alarming a picture did this word frequently conjure up in the minds of the laymen, that the word "asylum" was finally dropped and the same places that catered for the same type of sufferer were called "mental hsopitals". The situation now is that "mental hospitals", in its turn, has unpleasant associations and the word "psychiatric hospital" or "sanitarium" is being employed in many instances, though not as far as one can see with any marked success in allaying public uneasiness and apprehension. It would seem to be rather illogical to become involved in this sort of terminological escapism and to attempt to convert a
>
> spade into a tractor by calling it a tractor. Furthermore, the words complained of are now little used in ordinary conversation and are rapidly becoming archaic, so that they have lost much of the sting which they possessed ten or twenty years previsously. The fact that insanity is not a psychiatric but a legal word argues much for the retention of this term.[1]

It is not without significance that in all the recommendations submitted to the Gowers Commission "disease of the mind" were the words used in dealing with the question of criminal responsibility.

There was much criticism of the words "natural imbecility" on the ground that from a medical point of view they encompass only a case of imbecility by reason of only the lowest grade of immature mental development but they do not encompass cases of the higher grade of immature mental development and those cases where the accused person has suffered mental deterioration by reason of accident or old age. We have had no evidence that the term has been restricted in its legal application as in medical discussion. We feel confident that appellate courts would not support a direction to the jury, that an accused person who by reason of accident or old age or any other circumstance was so mentally deficient that he should be protected from criminal responsibility under the wording of section 16 (2) could not be found not guilty on the ground of insanity.

If the section is to be revised, we agree that the words "mentally defective" might be substituted for the words "in a state of natural imbecility" without impairing the adminstration of justice.

In considering terminology we have to commence with the legal presumption of sanity. This is a presumption that is expressed throughout legal jurisprudence and can hardly be displaced by a statutory change in terminology with respect to one branch of the law. It is a fundamental presumption that has been part of the civil and criminal law throughout history. It has a definite juristic meaning. To alter the presumption by a change of wording, even if it is intended to mean the same thing, might have legal consequences that cannot be foreseen. Even if there is a change in terminology from "insanity" to *"mental disorder"* and from "disease of the mind" to *"mental illness"*, the defence will still be known as a defence of insanity and will be referred to as such in legal literature. We doubt that the word "insane" has now any more opprobium attached to it in the public mind than has *"mental illness"*. It has been a term too long attached to the trial of the preliminary issue and the issue at the trial to be readily discarded for another term that may in a short time be replaced in medical parlance by still another.

[1] Exhibit 19.

CHAPTER XVII

CONCLUSIONS

1. A justice of the peace or magistrate holding a preliminary hearing under Part XV of the Criminal Code should have power to try an issue whether the accused is then on account of insanity unfit to stand trial and exercise the powers contained in section 524 of the Criminal Code, but any amendment to the law should be so framed as to preserve the right of the Crown to prefer an indictment or charge in the higher court notwithstanding the finding of the justice or magistrate.

2. No amendment should be made to the law with respect to the procedure in determining criminal responsibility.

3. There should be no change in subsections (1), (2) and (4) of section 16 of the Criminal Code unless the courts hold that the change of the word "the" to "an" in subsection (2) has made any significant alteration in the law, in which case the former wording of the Criminal Code in this respect should be restored. (Two dissentients)

4. Subsection (3) of section 16 should be deleted.

5. The addition of a defence of irresistible impulse related to disease of the mind would not be a wise amendment to the Criminal Code.

6. The repeal of section 16 and the substitution of the law of the State of New Hampshire or that of the District of Columbia would not make for a better administration of justice in Canada. (Two dissentients)

7. There is no sound reason to alter the burden of proof as it now exists under Canadian law.

8. Section 592 (1) (d) should be so altered that when the court of appeal acts under this subsection the judgment of the court would be that the accused is acquitted on account of insanity.

9. The Attorney General of a province should be given a right of appeal to the Supreme Court of Canada when a court of appeal exercises the powers conferred under section 592 (1) (d).

10. There should be no change in the law of provocation.

11. The law of diminished responsibility should not be adopted in Canada. (Two dissentients)

12. Statutory provision should be made for a board of review consisting of three psychiatrists to report to and advise the executive on the mental condition of all persons condemned to death.

13. The exercise of the power of commutation and the exercise of the royal prerogative of mercy should not be altered by statute.

14. No sufficient case has been made out for changes in terminology in the statute law, which has been the subject of jurisprudence for many years, but if section 16 is to be revised the words "mentally defective" might be substituted for the words "in a state of natural imbecility".

15. We respectfully recommend for the consideration of those responsible for the administration of justice in the provinces:

(a) that there should be a uniform practice of early psychiatric examination of all persons accused of capital offences, but such examination should not be made compulsory;

(b) that where the Crown has any psychiatric report on an accused person it should be furnished at an early stage to the defence;

(c) the adoption of uniform methods of reviewing the cases of those who are found not guilty on account of insanity and who are confined to mental institutions.

16. Early steps should be taken to get a clear and authoritative statement from the Supreme Court of Canada as to the proper instruction to a jury with respect to the interpretation of subsection (2) of section 16. If the Court decides that the proper interpretation is a narrower one than the one we have put upon it, the section should be amended to give to it the meaning that we think it has.

We have the honour to be,
Sir,
Your obedient servants,

J. C. McRuer,
Chairman.

Gustave Desrochers,
Vice-Chairman.

Helen Kinnear,
Commissioner.

Robert O. Jones,
Commissioner.

Joseph Harris,
Commissioner.

NOTE OF RESERVATION

BY HER HONOUR JUDGE HELEN KINNEAR

In signing this Report I wish to make the following comments regarding conclusions 5, 10 and 14 of Chapter XVII.

1. In agreeing with conclusion 5, that the defence of irresistible impulse related to disease of the mind be not adopted, I am assuming that the generous interpretation placed on section 16 (2) in the Report is broad enough to include any true case of irresistible impulse. If a narrower interpretation is placed on this subsection by the Supreme Court of Canada, then I would recommend its amendment by adding the words "or of preventing himself from committing or omitting it".

2. In agreeing with conclusion 10, that there should be no change in the law of provocation, I am assuming that the doctrine of diminished responsibility will not be adopted as law in Canada. Its adoption as recommended by Dr. Jones and myself in our statement of dissent would automatically result in a change in the law of provocation in cases where there is evidence of mental deficiency or disease of the mind falling short of the full defence of insanity.

3. I would make recommendation 14, relating to terminology, more definite in two respects, by recommending:

(1) the immediate substitution of the words "mentally defective" for the words "in a state of natural imbecility" in section 16 (2); and

(2) the immediate replacement of "an" before the word "act" in two places in section 16 (2) by "the" and "such" respectively in order to restore the former clarity as to what act is meant.

I think a sufficient case has been made out by the evidence to warrant these changes. I realize, however, that terminology is of secondary importance.

Helen Kinnear,
Commissioner.

MEMORANDUM OF DISSENT
OF
HER HONOUR JUDGE HELEN KINNEAR, LL.D.,
AND
ROBERT O. JONES, ESQ., B.Sc., M.D., C.M., F.A.P.A.,
two of the members of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases.

1. We express our feeling of utmost respect for the opinions and conclusions of the majority of our colleagues on the question of insanity and criminal responsibility, but, after most careful and anxious consideration and with regret, we find it necessary to dissent from three of the conclusions and recommendations in the Report.

2. Respectfully, we dissent from the following conclusions set out in Chapter XVII of the Report:

> 3. There should be no change in subsections (1), (2) and (4) of section 16 of the Criminal Code unless the courts hold that the change of the word "the" to "an" in subsection (2) has made any significant alteration in the law, in which case the former wording of the Criminal Code in this respect should be restored.
>
> 6. The repeal of section 16 and the substitution of the law of the State of New Hampshire or that of the District of Columbia would not make for a better administration of justice in Canada.
>
> 11. The law of diminished responsibility should not be adopted in Canada.

3. With regard to recommendations 3 and 6, we draw conclusions from the evidence given before our Commission relating to section 16 (2) different from those reached by our fellow commissioners. While we agree with the interpretation in the Report placed on section 16 (2), we conclude that both the evidence and reported cases show that that broad interpretation is not the usual one given to this subsection by Canadian courts. Even if that broad interpretation should be accepted generally, we still believe that it would be better to repeal subsections (1) and (2) of section 16 and replace them with the following:

> No person shall be convicted of an offence by reason of an act or omission on his part done or omitted while he is mentally deficient or has disease of the mind if such act or omission is the product of such deficiency or disease of the mind.

Or, as an alternative which we consider to be less desirable than the above recommendation but preferable to the present law as set out in section 16 (2), the recommendation made by the Gowers Commission[1], as follows:

> No person shall be convicted of an offence by reason of an act or omission on his part done or omitted while he is mentally deficient or has disease of the mind to such a degree that he ought not to be held responsible.

Subsection (3) is not in issue, as we are all agreed that it should be deleted. Subsection (4) is not in issue, as we are all agreed that the burden of proof should remain unchanged.

4. If Parliament should not see fit to accept our dissenting recommendation relating to section 16 (1) and (2), then we would give strong support to the recommendations set out in conclusion 16 of Chapter XVII of the Report designed to obtain an authoritative statement of the Supreme Court of Canada with respect to the interpretation of subsection (2).

5. With regard to conclusion 11 of Chapter XVII of the Report, we believe that the evidence shows that there are degrees of mental deficiency or mental illness not sufficient to absolve persons from all responsibility for criminal offences but sufficient nevertheless to make such persons not fully accountable for their actions. We recommend that section 16 be amended to provide for the operation of the doctrine of diminished responsibility, as practised in Scotland, in cases where there is evidence of mental deficiency or disease of the mind falling short of the full defence of insanity, whether section 16 (2) is retained, amended or replaced by a new criterion.

6. A memorandum setting out our reasons for our recommendations is submitted in an appendix to our statement of dissent.

Helen Kinnear, Commissioner.

Robert O. Jones, Commissioner.

[1] The Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 276.

APPENDIX A

REASONS FOR DISSENT

CHAPTER I

HISTORY OF THE PRESENT LAW RELATING TO INSANITY AS A DEFENCE

1. Section 16 came into force April 1, 1955. It replaced section 19 C.C. (1927) which repeated verbatim section 11 C.C. (1892) effective July 1, 1893, the first codification of the criminal law in Canada. Section 11 was based on the N'Naghten Rules laid down by the judges in England (one refraining from joining in the opinion) in 1843 in answer to questions submitted to them arising out of M'Naghten's Case.[1] M'Naghten had shot and killed Drummond, Sir Robert Peel's private secretary, believing him to be Peel. M'Naghten was labouring under the insane delusion that he was being hounded by enemies of whom Sir Robert Peel was one. He pleaded insanity as a defence. The medical evidence was that he was affected by morbid delusions which robbed him of the power to control his actions and left him with no perception of right and wrong, and that he was incapable of excercising any control over acts connected with his delusion. He was found "not guilty on the ground of insanity". The case was a subject of subsequent debate in the House of Lords with the result that the judges of England were asked their opinion on the law governing such cases and certain questions were put to them.[2] It is to be noted that the replies to Questions I and IV,[3] which relate to partial delusions, and to Question V,[4] which deals with the giving of evidence by a doctor who was present during the trial but had not previously seen the prisoner, are not in practice applied in England at the present day.[5]

2. In the Canadian codification (1892) the words of the M'Naghten Rules were changed in three respects:

(1) In subsection (1), the word "appreciate" was substituted in the first test for "know".

(2) The word "and" was substituted for the word "or" between the two tests.

(3) In subsection (3) the word "clearly" was omitted before the word "proved".

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

3. Since 1843 there has been no change in the law in England relating to the word "or".[6] Even prior to 1843 a defence of insanity could be made out by showing that the defendant met either one or other of the tests.[7]

4. In Canada, while the word "and" was not for many years the subject of judicial interpretation, it was interpreted as "or" without comment in Clark v. R.[8] The meaning of the word was definitely clarified by the Court of Appeal in R. v. Cracknell.[9] Magee J. A. said, at p. 639:

> In so serious a matter it cannot be implied that the common law has been changed without clear enactment, and it must be taken that that law as declared by the Judges is still the law in Canada . . . The direction to the jury in the present case was made without reference to the established and unrepealed rule and was not in accordance with it.

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[1] (1843) Clark & Fin. 200.
[2] See p. 20 ante.
[3] See pp. 20-21 ante.
[4] See p. 21 ante.
[5] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 79, para. 226.
[6] R. v. Dillon (1939) 27 Cr. App. R. 149.
[7] R. v. Hadfield (1800) 27 How. St. Tr. 1281.
[8] (1921) 35 C.C.C. 261; (1921) 61 S.C.R. 608.
[9] (1931) O.R. 634.

The court ignored the plain dictionary meaning of the word "and" to keep the law as codified in line with the M'Naghten Rules.

5. The question regarding the degree of proof required of the defendant to show insanity under the codified law was dealt with by the Supreme Court of Canada in Clark v. R. (ante). We quote Anglin J. at p. 626:

> Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong. That I believe to be the law of Canada . . .

In Smythe v. R.[1] the decision was based on Clark v. R. (ante). In the judgment of the Court, Duff C. J. said, at p. 18:

> It is the rule that prevails generally in civil cases, as this Court decided in the case above mentioned (Clark v. R.), which governs the jury in determining the issue raised by a plea of insanity.

6. In England, although the words "clearly proved" appear in the M'Naghten Rules, nevertheless those words have been construed by the courts to mean that the burden of proof upon the accused is no higher than that which rests upon a party in civil proceedings.[2]

7. In delivering the judgment of the Privy Council in Sodeman v. R.,[3] Lord Hailsham L. C. said, at p. 191:

> . . . it was certainly plain that the burden in cases in which an accused had to prove insanity might fairly be stated as not being higher than the burden which rested upon a plaintiff or defendant in civil proceedings. That that was the law was not chanllenged...

Sodeman v. R. was quoted with approval and relied on by Hope J. A. in the Ontario case of R. v. Gibbons.[4]

8. The result is that both in Canada and in England the burden of proof in cases in which insanity is pleaded is the same.

9. The most important difference between our present statute law as contained in section 16 (2) of the Criminal Code and the law relating to insanity as a defence to a criminal charge in England as it has developed since the M'Naghten Rules were formulated is in the substitution of the word "appreciate" for the word "know". While we agree that the word "appreciate" is properly interpreted in Chapter V of the Report[5] in the light of the Interpretation Act,[6] we think that such an interpretation disregards the general tendency apparent in our jurisprudence since the codification in 1892 of the law relating to insanity as a defence, which is to rely on English authorities and treat the codification as a restatement of the M'Naghten Rules. The evidence heard by our Commission showed that notwithstanding the use of the word "appreciate" in our codified law there was a wide difference of opinion among judges regarding the interpretation of the intellectual test set out therein. Likewise, the evidence heard by the Gowers Commission showed a similar disparity, which it deplored, in England in interpreting the test.[7] Even though such eminent witnesses as Sir John Anderson and Lord Simon, two former home secretaries, testified to a stretching of the rules to make them workable,[8] the Gowers Commission concluded nevertheless that the rules could not be justified in the light of modern knowledge and modern penal laws.[9] Mr. Justice Frankfurther, an eminent American witness, thought the scope of the rules, even when most broadly interpreted, altogether too narrow in the light of modern knowledge and dared to believe that the rules could be improved upon.[10]

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[1] (1941) S.C.R. 17, (S.C.C.).
[2] Sodeman v. R. (1936) 2 All E.R. 1138; (1936) W.N. 190.
[3] Ibid.
[4] (1946) O.R. 490.
[5] See p. 15 ante.
[6] R.S.C. 1952, c. 158, s. 15.
[7] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, pp. 81-84, para. 232-243.
[8] Ibid., p. 82, para. 235.
[9] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 103, para. 291.
[10] Ibid, p. 102, para. 290.

10. We have not been able to find any reported Canadian cases where insanity was a defence to a criminal charge in which the word "appreciate" in section 16, or the previous sections 19 or 11, has been the subject of adjudication by a court of last resort. The most apt authority at appellate court level would appear to be R. v. Harrop.[1] In that case, the trial judge had failed to charge the jury on the second alternative, namely, "of knowing that such an act was wrong" and the Court of Appeal held that to be an error necessitating a new trial. Prendergast C. J. M. in dealing with the charge of the trial judge said this:

> The learned judge dealt in his charge very fully and lucidly with the first part down to the word "and" before the words "of knowing" in the said section, and his direction that the accused's appreciation of "the nature and quality of the act" meant in that case her appreciation of its physical consequences, was the proper one to give.

11. However, the reported cases generally appear to show that both trial judges and judges of appellate courts use the word "know" frequently instead of "appreciate", that they frequently use both words in the same case as if they were synonymous and that they do not amplify the meaning of "appreciate" when they do use it, a situation which would appear to us to be due to the influence on our jurisprudence of the M'Naghten Rules.

12. The Criminal Code of 1892 provided that all rules and principles of the common law which render any circumstances a justification or excuse for any act or a defence to any charge were to remain in force and be applicable to any defence to a charge under the Code except in so far as they were altered by the Code or inconsistent with it (section 7). This provision was carried forward to the Criminal Code of 1927 (section 16). It is carried forward to the present Code in the following form:

> 7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.
>
> (2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

That these provisions have affected the courts in dealing with the interpretation of the provisions of the Code relating to insanity as a defence appears evident from the cases. In citing cases, we stress that the word "appreciate" was not the ratio decidendi in any of them.

13. The following are examples:

(1) Clark v. R.[2] In this case the Supreme Court of Canada dealt with the burden of proof where insanity was pleaded. The M'Naghten Rules used the word "clearly". Section 19 omitted that word. In coming to his conclusion as to the nature of the burden, Duff J., as he then was, reviewed numerous English authorities. He concluded that there was no uniform practice of directing the jury on the point and so proceeded to determine the method to be employed using the word "clearly" but defining it as meaning "a clear preponderance of evidence". In concurring in the judgment, Mignault J. pointed out, at page 630, that

> . . . although we have an express declaration by the legislature, the Code really adds nothing to the common law; in fact the presumption of sanity of mind, involving criminal responsibility, is recognized in England as well as in all countries, and our inquiries need not carry us further, which are subject to the common law.

He went on to apply the words of the M'Naghten Rule

> . . . that the jurors should be told that every man is presumed to be sane until the contrary is proved to their satisfaction, (I do not here refer to the further statement of the judges, speaking by Tindal C.J., that insanity must be "clearly proved") as being in effect the rule of our criminal code,

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[1] (1940) 74 C.C.C. 228 (Man.).
[2] (1921) 61 S.C.R. 608.

even though the Code did not contain the words "to the satisfaction of the jury". With the emphasis placed on the M'Naghten Rules by the Court, it is of interest to note that Anglin J. said this with regard to section 19 (3), at p. 626:

> Here I find nothing to warrant requiring evidence of greater weight than would ordinarily satisfy a jury in a civil case that a burden of proof had been discharged—that, balancing the probabilities upon the whole case, there was such a preponderance of evidence as would warrant them as reasonable men in concluding that it had been established that the accused when he committed the act was *mentally incapable of knowing its nature and quality, or if he did know it, did not know that he was doing what was wrong*. That I believe to be the law of Canada, as it appears to be that of most of the states of the American Union.

In so stating, he used the phrase "incapable of knowing" although the phrase used in section 19 (2) was "incapable of appreciating".

(2) R. v. Cracknell[1] was a decision in which the points in issue were (a) the meaning of the word "and" (see para. 4 ante) and (b) the effect of the direction of the trial judge to the jury that in event of a verdict of murder being given he had no doubt at all that the man's sentence would be commuted to life imprisonment. The prisoner was found guilty of murder. There was no appeal but application was made on the accused's behalf for the mercy of the Crown, whereupon the Minister of Justice in exercise of the powers conferred upon him by section 1022 (2) C.C. referred the whole case to the Appellate Division of the Supreme Court of Ontario and so the case came before that court to be heard and determined as if it were an appeal by the accused from his conviction. Mulock C. J. O. said regarding section 19, at p. 637:

> This section is in the exact words of one of the rules in M'Naghten's case, 10 Cl. & F. 200, except that it substitutes the word "and" for "or".

Yet actually "appreciating" had been substituted for "knowing". Later he twice used the word "appreciate", at p. 638:

> . . . even though he might have appreciated the physical not the moral nature and quality of his act"

and

> Thus, in order to establish his defence it was not necessary to prove both incapacity to appreciate the nature and quality of his act and also absence of guilty intent.

Magee J. A. said, at p. 639:

> In England in R. v. Flavell (1926), 19 Cr. App. R. 141, it was declared that the rules in M'Naghten's Case still stand. The direction to the jury in the present case was made without reference to the established and unrepealed rule and was not in accordance with it.

Hodgins J. A. said, at p. 639:

> If the nature and quality of the act is not known to the accused so that his mind did not grasp its physical character, it is idle to inquire if he knew the act to be wrong.

Use of the word "know" for "appreciate" showing the reliance on English authorities was made also in other cases, including R. v. Chupiuk[2] and R. v. Cardinal.[3] The headnote in R. v. Cardinal reads:

> The test of insanity as an excuse for a crime is whether the accused knew the nature and quality of the act he was committing. If he did not, insanity is established. If he did, the enquiry must be made whether he knew at the time that the act was wrong. "Wrong" here does not mean wrong in the moral sense, but wrong in the sense that it was contrary to law: Reg. v. Holmes (1953) 1 W.L.R. 686. (See para. 17, p. 111, post).

14. Our conclusion as to the meaning which has been attached quite generally in Canada to the word "appreciate" and the effect of the M'Naghten Rules on its meaning receives

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[1] (1931) O.R. 634 (C.A.).
[2] (1949) 8 C.R. 398 (C.A. Sask.).
[3] (1953-4) 10 W.W.R. (N.S.) 403 (C.A. Alta.).

strong confirmation in the evidence of psychiatrists testifying before this Commission. Many of them thought either that the M'Naghten Rules were in force in Canada or that the question asked of psychiatrists in court relating to the nature and quality of the act was qualified by the word "know". Many of them felt hampered in giving evidence by reason of the use of that word "know".[1] For example, Dr. Marshall would like to see the word "appreciate" further elaborated. He said that it was the prosecutor who asks the question and he says "know".[2] He thought it would be quite all right if he were asked: "Having heard the evidence that is disclosed here and from your examination of accused, in your opinion as a medical man, did the accused at the time he did the act appreciate the nature and quality of the act or know that it was wrong?" He said that was not the way the question was usually asked. It was put in hypothetical form[3] and the word "know" was used.[4] Dr. Doyle said, "I am afraid trial judges do not often interpret our Code that way." He said also that juries do not interpret it that way.[5] Dr. Weil said that it depended on the Crown prosecutor how the question was put and gave this example of a question put to him: "Did he know when he used the baseball bat in the way that he did that he was going to kill the person?" He had to answer, "Yes." The word "appreciate" might have helped him; the brief of the Canadian Psychiatric Association was drawn on the assumption that the M'Naughten Rules were in force here;[6] the same is true of the Quebec Psychiatric Association;[7] the John Howard Society of Quebec, Inc.;[8] and the Canadian Mental Health Association, Saskatchewan Division.[9]

15. Likewise many lawyers, including teachers of law, appearing before the Commission and familiar with existing jurisprudence in a practical way, or as students, considered "appreciate" in section 16 to be synonymous with "know".[10] Mr. Remnant said that "know" is the word which has received judicial interpretation and that it would be a mistake to broaden the meaning for that reason.[11] He said that nearly always the question put by judges and lawyers was: "Did this man know what he was doing?"[12] W. B. Common, Q.C.,[13] thought that the terms were synonymous, considering that it was the lay mind that was interpreting.[14] T. J. Rigney, Q.C., Ont.,[15] thought the word "appreciate" should be given "a very definite and apposite explanation" if one wished the jury to understand it. Otherwise it would be liable "to carry with it into their minds different ideas". G. A. Martin, Q.C., Ont., felt that the M'Naghten Rules were, "by and large", followed in Canada and excluded defences such, for example, as irresistible impulse which a broad interpretation of the word "appreciate" might otherwise cover.[16] If the rules were broadly interpreted, he felt they should be retained and should need no additional amendment or additional qualification. He said:[17]

> . . . but if the trend of judicial authority precludes that wider interpretation I am speaking about, then undoubtedly I would be in favour of having Section 16 amended. The matter has not remained free from doubt perhaps, I think, on the authorities.

16. Undoubtedly, some trial judges in Canada are accustomed to explaining the meaning of the word "appreciate" in its fullest sense to the jury.[18] W. O. Gibson, Q.C., Ont., said:[19]

> I have never heard the word "knowing" used in a judge's charge. "Appreciating" has been the word. It has been strictly confined to that word.

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[1] Dr R. R. Prosser, N.B., Evid. 102; Dr. E. C. Menzies, N.B., Evid. 119, 122; Dr. Murray MacKay, N.S., Evid. 279-80; Dr. D. G. McKerracher, Sask., Evid. 725; Dr. A. J. Murchison, P.E.I., Evid. 184; Dr. C. S. Marshall, N.S., Evid. 389.
[2] Evid. p. 390.
[3] Evid. p. 387.
[4] (Evid. p. 390): Dr. A. T. Mathers, Man., Evid. 550; Dr. D. G. McKerracher, Sask., Evid. 603; Dr. G. F. Nelson, Sask., Evid. 619; Dr. C. S. Tennant, Evid. 1779, Exhibit 34; Dr. A. M. Doyle, Ont., Evid. 1688.
[5] Evid. p. 1690; Dr. J. P. S. Cathcart, Ont., Evid. 1705; Dr. R. J. Weil, N.S., Eivd. 233.
[6] Evid., Exhibit 5, p. 92.
[7] Evid., Exhibit 27, p. B. 2.
[8] Evid., Exhibit 26, p. 1226A.
[9] Evid. p. 735, Exhibit 19.
[10] Dean W. K. Bowker, Alta., Evid. 660; T. G. Norris, Q.C., B.C., Evid. 963; H. A. MacLean, Q.C., B.C., Evid. 804; Angelo E. Branca, Q.C., B.C., Evid. 879; S. J. R. Remnant, Q.C., B.C., Evid. 918-19.
[11] Evid. p. 925-6.
[12] Evid. p. 930.
[13] Evid. p. 1774.
[14] Evid. p. 1241.
[15] Evid. p. 1747.
[16] Evid. pp. 1397-1402.
[17] Evid. p. 1402.
[18] Evid. p. 1401.
[19] Evid. p. 1544.

Some psychiatrists testified on the point. Dr. G. J. O'Brien, Newfoundland, testified to a broad interpretation there.[1] Dr. C. S. Black, also of Newfoundland, gave an excellent definition of the word although he did not say he had ever heard it used in court:[2]

> . . . not merely knowing what one does, but having a clear notion of all that the act means, and the consequences that will flow from it both to others and to oneself.

Dr. D. G. McKerracher, Sask., thought the rules liberally interpreted there.[3] Dr. G. H. Stevenson thought there was less rigid application of the rules and interpretation of the word "appreciate" in more recent years in British Columbia.[4] On the other hand, Dr. E. C. Menzies, N.B., going to the other extreme, said:[5]

> It has to be a very deepseated disease of the mind to make me feel that the man cannot appreciate.

Dr. Murray MacKay, N.S., thought it very hard for a jury to grasp the difference between intellectual knowledge and appreciation.[6] Dr. G. E. Reed, Que., thought that using "appreciation" in its widest sense might help. He said:[7]

> I realise the whole thing hinges on that word "appreciate". Of course, if it is made broad enough to be almost meaningless it is perfectly all right.

Dr. J. P. S. Cathcart, Ont., one of Canada's most experienced court psychiatrists, said:[8]

> I am not just sure that I have been fully aware of that part that you are speaking of, the explanation of "appreciation".

He doubted that a broad interpretation of the word would go far enough to include all accused persons who should not be held responsible.[9] Dr. Clyde S. Marshall, N.S., thought judges should elaborate on the word "appreciate". He thought that juries did not realize the difference between "know" and "appreciate".[10]

17. With regard to the meaning of the word "wrong" as used in former section 19 (1), now section 16 (2), in the clause "of knowing that the (an) act or omission was wrong", we have now two important conflicting decisions:

(1) R. v. Laycock.[11] The accused was found guilty of murder. He stated in the witness box that he knew the act was legally wrong, he knew it was morally wrong and he knew there were consequences. The learned trial judge pointed this out to the jury but did not direct the jury to consider other statements of the accused which the jury might consider inconsistent with those statements or to consider psychiatric evidence to the effect that accused was in a paranoid state as a result of which there was a serious disturbance of judgment. A new trial was ordered on the ground that the question of insanity should have been and was not passed upon by the jury or put to them in such a way as to ensure their due appreciation of the value of the evidence. The conclusion to be drawn from the appeal case is that evidence that the accused did not know that the act was morally wrong must be put to the jury when insanity is in issue.

(2) R. v. Cardinal[12] was a decision of the Court of Appeal for Alberta about a year later than the Ontario decision in R. v. Laycock. It held that a direction by the trial judge in the following terms constituted a misdirection necessitating a new trial:

> The question is: "Did Cardinal have a sufficient degree of reason to know when he shot his wife through the ear he was doing what was wrong?" . . .
>
> In deciding this question the test to be applied is the ordinary standard of right and wrong adopted by reasonable men.

Frank Ford J. A. quoted with approval Lord Goddard C. J. in R. v. Holmes:[13]

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[1] Evid. p. 433.
[2] Evid. p. 444.
[3] Evid. p. 595.
[4] Evid. p. 771.
[5] Evid. p. 127.
[6] Evid. p. 303.
[7] Evid. p. 1069.
[8] Evid. p. 1712.
[9] Evid. p. 1713.
[10] Evid. pp. 359-60.
[11] (1952) 104 C.C.C. 274 (C.A. Ont.).
[12] (1953) 10 W.W.R. (N.S.) 403 (C.A. Alta.).
[13] (1953) 1 W.L.R. 686; (1953) 2 All E.R. 324.

> . . . the test of insanity as an excuse for a criminal act . . . is whether or not the man knew the nature and quality of the act he was doing. If he did not, that establishes insanity. If he did, one must then go further and say: "Did he know at the time that the act was wrong?" . . . "Wrong," according to the decision of this court, does not mean wrong in the moral sense, but wrong in the sense that it was contrary to law.

If section 16 (2) is retained the conflict in decision in these two authorities and the question of the meaning of the word "appreciate" will await final determination by decisions of the Supreme Court of Canada, or, in the alternative, by clarifying amendments to section 16.

CHAPTER II

ADEQUACY OF THE PRESENT LAW IN CANADA

18. We deal next with the question of the adequacy of the present statutory law. We are mindful that the primary purpose of the criminal law is to protect the public and that, while other considerations than retribution enter into the disposition of a person convicted of a crime, nevertheless, most people feel instinctively that a person who has committed a crime should be punished for it. They feel that the penalties provided by the Code are the most effective deterrent against crime and are disturbed when light penalties are imposed for serious crimes. On the other hand, there is also an instinctive feeling in most people that persons who commit crimes, even serious crimes, for reasons beyond their control ought not to be held responsible for them, and the public conscience is disturbed when it seems obvious that persons falling in that category are convicted and sentenced. The public conscience is not set at rest by a subsequent extension of clemency. We conclude that from the general tenor of the evidence, as we do also that the present law relating to insanity as a defence is defective in this regard.

19. The preponderance of opinion among the legal witnesses, including members of the judiciary who were good enough to discuss our problems with us, was that the law as it stands when coupled with the exercise of the royal prerogative of mercy resulted in substantial justice, although it was suggested by several witnesses that the aim of the law should be to achieve substantial justice in the first instance and not by having to rely on a later extension of mercy. Mr. L. H. McDonald, N.S., [1] thought it foreign to our concepts of the duties and functions of courts to have to rely on executive clemency to obtain justice. Mr. Dollard Dansereau, Q.C., Que.,[2] thought it a shifting of our responsibility from the courts to a non-judicial body. However, Mr. W. B. Common, Q.C.,[3] thought that a rigid uniformity as to the meaning of wrong was necessary for the proper administration of justice and would fall back on the royal prerogative of mercy to overcome any injustice.

20. We think that it should be possible to amend the law to reduce considerably our reliance on the royal prerogative of mercy and still achieve substantial justice. We think we should be able to develop a principle which would avoid the necessity of judges having to sentence persons to death in those cases in which there is now a strong probability that mercy will be extended and the sentence not carried out.

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[1] Evid. p. 477.
[2] Evid. pp. 1109-15.
[3] Evid. p. 1294.

CHAPTER III

REPEAL AND A NEW CRITERION

21. Doctors with experience in mental diseases appearing before the Gowers Commission contended[1]

> . . . that the M'Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions.

The Commission pointed out that[2]

> Most medical men would take the view that in the violent acts of an insane man his insanity has been, as a general rule, an essential and predominant cause, and that therefore he should not be judged by the same standards as normal men.

The same views were expressed before our Commission. Many psychiatric witnesses objected to the law as it is on the ground that a finding of responsibility had to be made on symptoms inadequate for the purpose rather than on the disease and that that seriously hampered the expert witness in presenting the true picture to the court. As put by Dr. A. W. MacLeod, Que.[3]

> . . . a person functions as a total personality, and I have not any clinical evidence myself that an individual can be mentally impaired in one area of his thinking without being impaired in all areas of his thinking.

Other experts expressing similar views included Dr. G. H. Stevenson, B.C.;[4] Dr. G. E. Reed, Que.;[5] and Dr. R. R. Prosser, N.B.[6] Some psychiatric witnesses criticized the law as it stands though unable to suggest a satisfactory substitute.[7] While Dr. Tennant favoured retention of the present law subject to the deletion of subsection (3), he saw merit in the New Hampshire rule (our first recommendation in paragraph 3 of our statement of dissent) and could foresee no difficulty arising from it. He favoured no halfway measures. The law should be either one or the other. He thought[8] the New Hampshire Rule the best suggestion he had ever seen for the replacement of the present law.

22. Mr. Gordon S. Black, Vice-President of the Welfare Council of Halifax, who spoke on behalf of that Council, representing sixty-four different city organizations, would have the following questions submitted to the jury:[9]

(a) Did the Prisoner commit the act alleged?

(b) If the answer to question (a) is yes, was he mentally defective or suffering from mental disease at the time the act was committed?

(c) If the answer to question (b) is yes, was the accused at the time the act was committed suffering from mental disease or mental deficiency to such a degree and/or of such a character that he should not be held responsible for it?

23. The New Hampshire rule is as follows:[10]

> No person shall be convicted of an offence in respect of an act or omission on his part done or omitted while he is mentally deficient or has disease of the mind if such act or omission is the product of such deficiency or disease of the mind.

That rule as applied to criminal law was first laid down by Judge Doe in instructions to the jury, approved on appeal, in State v. Pike in 1869.[11] The M'Naghten Rules and all other

[1] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 80.
[2] Ibid., p. 80.
[3] Evid. p. 1017.
[4] Evid. p. 760.
[5] Evid. pp. 1065-6, 1079-83.
[6] Evid. pp. 102-3.
[7] Dr. Murray MacKay, N.S., Evid. p. 276; Dr. G. F. Nelson, Sask., Evid. p. 621; Dr. A. T. Mathers, Man., Evid. p. 568; Dr. J. A. Huard, Que., Evid. p. 1035; Dr. M. G. Martin, Sask., Evid. p. 610, who expressed not only his own views but also that of the Saskatchewan Psychiatric Association; Dr. R. J. Weil, N.S., Exhibit 18, Evid. p. 234; Dr. R. R. MacLean, Alta., Evid. p. 710; Dr. C. S. Tennant, Ont., Evid. pp. 1779-80, Exhibit 34, Evid. pp. 1310, 1312.
[8] Evid. p. 1318.
[9] Evid. pp. 217-18.
[10] See Memorandum of Dissent, para. 3.
[11] (1869) 49 N.H. 399.

"tests' of criminal responsibility were expressly repudiated and responsibility was declared to be a question of fact for the jury. The following quotations from the judgment of Judge Doe, who also sat with the full court on appeal, are pertinent. At p. 437:

> When the authorities of the common law began to deal with insanity, they adopted the prevailing medical theories.

In other words, they gave the best opinions the times afforded. At p. 438:

> Whether the old or the new medical theories are correct, is a question of fact for the jury; it is not the business of the Court to know whether any of them are correct. The law does not change with every advance of science; nor does it maintain a fantastic consistency by adhering to medical mistakes which science has corrected . . . It is often difficult to ascertain whether an individual had a mental disease, and whether an act was the product of that disease, but these difficulties arise from the nature of the facts to be investigated, and not from the law; they are practical difficulties to be solved by the jury, and not legal difficulties for the court.

And at p. 441:

> When disease is the propelling, uncontrollable power, the man is as innocent as the weapon,—the mental and moral elements are as guiltless as the material . . . If a man knowing the difference between right and wrong, but deprived, by either of those agencies (disease, force), of the power to choose between them, is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very thing for which the law says he shall not be punished.

In State v. Jones[1] the principle laid down in the Pike case was approved and reaffirmed on appeal. Quotations from the judgment of Ladd J. are in point. At p. 382 he said:

> When, as in this case, a person charged with crime admits the act, but sets up the defence of insanity, the real ultimate question to be determined seems to be, whether, at the time of the act, he had the mental capacity to entertain a criminal intent—whether, in point of fact, he did entertain such intent.

Regarding the M'Naghten Rules, he said, at p. 388:

> . . . it was an attempt to lay down as law that which, from its very nature, is essentially matter of fact. It is a question of fact whether any universal test exists, and it is also a question of fact what the test is, if any there be.

At p. 393 he said:

> At the trial where insanity is set up as a defence, two questions are prescribed:—First: Had the prisoner a mental disease? Second: If he had, was the disease of such a character, or was it so far developed, or had it so far subjugated the powers of the mind, as to take away the capacity to form or entertain a criminal intent? The first is so purely a question of fact, that no one would think of disputing it any sooner than he would dispute that it was a question of fact whether a man has consumption or not. It is in settling the second that all the difficulty arises.

And at p. 394 he said:

> But in cases of this sort, the argument of convenience is not to be admitted. No formal rule can be applied in settling questions which have relation to liberty and life, merely because it will lessen the labor of the court or jury . . . 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.

24. The same principle was advocated in England by Sir James Stephen, a judge of the High Court of Justice, Queen's Bench Division, years ago. In his "History of the Criminal Law of England" he wrote:[2]

> The proposition, then, which I have to maintain and explain is that, if it is not, it ought to be the law of England that 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 from controlling his own conduct, unless the absence of power of

[1] (1871) 50 N.H. 369.
[2] (1883) vol. 2, p. 168.

control has been produced by his own default . . . How, it may be asked, can a man be responsible for what he cannot help?

25. The New Hampshire decision received unexpected and important confirmation in 1954 in the important Federal jurisdiction of the District of Columbia, a highly important area in the United States having a population of about 859,000 according to the 1956 Population Estimates of the Bureau of the Census, U.S. Department of Commerce. In Durham v. United States[1] the United States Court of Appeals, District of Columbia Circuit, allowed an appeal and ordered a new trial in a case in which insanity was in issue. In the District of Columbia the formulation of tests is entrusted to the courts. Prior to 1929, the courts relied on the M'Naghten Rules when insanity was pleaded. In 1929, the additional test of "lack of power to control" was adopted. In the Durham case these tests were discarded. The essence of the direction of the Court to trial judges was that they should instruct juries when insanity is pleaded that, to convict, they must find (1) that the accused was not suffering from a mental defect or disease, and (2) that even if he did so suffer, the act was not the product of that condition.

26. We point out that in the District of Columbia, while there is a basic presumption of sanity, that presumption is displaced as soon as some evidence of insanity is introduced. Thereupon, the burden is cast on the government to prove the sanity of the accused beyond reasonable doubt. "Some evidence" would appear to be something more than a scintilla of evidence and something less than evidence sufficient to raise a reasonable doubt.[2] The fact that the burden of proving sanity beyond reasonable doubt lies on the government accounts for the particular wording of the extended instructions in the Durham case. In New Hampshire, as in every American jurisdiction (with the exception of Nebraska and the District of Columbia), the basic presumption of sanity holds until evidence is produced to raise a reasonable doubt of accused's responsibility,[3] then the burden is shifted to the state to prove the sanity of the accused beyond reasonable doubt. A heavy burden of proof therefore is placed on the prosecution in such cases in these jurisdictions in the United States from which the prosecution in Canada is relieved.

27. In Canada insanity is treated as a matter of defence. The burden of proof is on the accused to show that he was insane at the time the act was committed and that he qualifies under one of the tests in section 16. As set out in Chapter IX of the report, that burden is satisfied by a preponderance of evidence. If the principle of the New Hampshire and District of Columbia rule were adopted here, namely, that an accused person should not be held responsible if his unlawful act was the product of a defect or disease of the mind — and all we advocate is the principle, not the method of proof—an accused person in Canada would still be in a much less happy position than would an accused person in either New Hampshire or the District of Columbia because of the difference in the burden of proof.

28. Notwithstanding that the burden of proving sanity is on the government in the District of Columbia, statistics obtained from the United States Attorney's Office show that from July 14, 1954, the date of the Durham decision, to April 25, 1955, the date of the report of the Committee on Mental Disorder referred to in paragraph 26 above, convictions were registered there in eighty per cent of the criminal cases in which insanity was pleaded as a defence.[4] That fact should set at ease the minds of those who fear that the adoption of such a law would provide an easy escape for accused persons from responsibility, as should also the fact that persons acquitted on the ground of insanity do not go free; they face the prospect of a lifetime spent in a mental institution.

29. While we have not been able to obtain recent statistics from New Hampshire, we have a letter from the Chief Justice of that State, Kenison C. J., addressed to our Chairman and dated May 2, 1955, in which he states:[5]

> The New Hampshire rule has worked successfully in this state. It has not been criticized or found impracticable by either prosecutors or defenders and the verdicts of

[1] 214 Fed. R. 2d Series, 862.
[2] Tatum v. United States (1951) 190 F. 2d 612; Wright v. United States (1954) 215 F. 2d 498.
[3] Report of the Committee on Mental Disorder as a Criminal Defence submitted April 25, 1955, to the Council of Law Enforcement of the District of Columbia, p. 9.
[4] Ibid., p. 18. See also the statistics set out in our Report at p. 63.
[5] See also the statistics set out in our Report at p. 62.

juries under the New Hampshire rule have reached a result which would seem to be more consistent with ordinary wisdom than is possible under the M'Naghten Rules.

30. Mr. Simon E. Sobeloff, Solicitor General of the United States, wrote an article, "From McNaghten to Durham, and Beyond", which appeared in the issue of July, 1955, of The Psychiatric Quarterly.[1] It has since been published in pamphlet form by State Hospitals Press, Utica, N.Y. He says:[2]

> The full merit of the New Hampshire decision and of the more recent District of Columbia opinion in the Durham case is precisely that they do not attempt to embody one set of medical theories in place of another, for even if it were possible to frame a test embodying more modern knowledge there would still be the danger that in the progress of science the new rule itself might be found inadequate. The whole point is not to restrict the test to particular symptoms, but to permit as broad an inquiry as may be found necessary according to the latest accepted scientific criteria.

At p. 7 he says:

> . . . the Durham rule has been criticized on the score of its vagueness, for it does not pronounce as a matter of law precisely what symptoms are sufficient for a finding of mental irresponsibility. This criticism seems to me without merit. The facts as to mental condition will be endless in their variety. It is for the psychiatrists, after a study of the defendant, to inform the jury of their observations and interpret them in the light of their knowledge and experience. The jury will consider the evidence of the psychiatrists as they do expert testimony in any field. No longer will they be restricted to the artificial and discredited right-wrong test. They will not be forced to ignore the question of the extent to which the defendant's lack of control over his emotions has deprived him of control over his acts, or, if you please, has overcome his will, for that is crucial in arriving at an intelligent verdict.

At p. 8 he writes:

> To put it in general terms, the jury will, as heretofore, be called on to distinguish whether the act was done with evil intent (mens rea) for which there is criminal responsibility, or was the product of a mental condition that makes the act not one of free will, and hence not criminally punishable. The right-wrong test is not completely abandoned; it is merely dethroned from its exclusive pre-eminence.

And at p. 9 he writes:

> The concept of causality expressed in the court's use in the Durham case of the word "product" has also been criticized as leaving too much to the fact-finders' discretion, but this is no broader a discretion than courts habitually accord juries when they charge them to determine proximate cause in negligence cases.
>
> What we ought to fear above all is not the absence of a definition but being saddled with a false definition. We must avoid the rigidity which precludes inquiry, which shuts out light and insists on concepts that are at odds with things known and acknowledged, not only by the medical profession, but by all informed men.
>
> The McNaghten rule requires medical witnesses to testify in terms that to them are artificial and confining. A doctor can offer expert judgment when he talks of illness, disease, symptoms, and the like. When he is forced to adopt the vocabulary of morality and ethics, he is speaking in what to him is a foreign language and in an area in which he claims no expertness. If the wrong questions are asked, it should surprise no one if wrong answers are given. Is it not preferable to permit the medical witnesses sufficient latitude to describe the conditions and express their findings in terms they consider significant and meaningful?

These observations are of particular interest because they are made by the Solicitor General of the United States, even though he happens to be speaking at the moment in his personal, not his official capacity.

31. There remain for consideration the findings of the Gowers Commission on the law relating to insanity as a defence in capital cases. The Commission recommended (eight favouring, three dissentients) that the M'Naghten Rules be abrogated and that it be left to

[1] Vol. 29, pp. 357-71.
[2] Pamphlet, p. 6.

the jury 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.

32. There was a very wide range of opinion among the many eminent witnesses who gave evidence before the Gowers Commission as to retention of the rules, their amendment or abrogation. That Commission addressed itself to the answering of two questions:[1]

> Do the M'Naghten Rules provide a just and reasonable standard by which to assess whether the mental state of an accused person was at the time of the crime so abnormal that he ought to be held irresponsible and exempted from punishment? And, if not, what change in the law, whether by amendment or by abrogation of the Rules, would be practicable and desirable?

The Commission drew these general conclusions from the evidence:[2]

> The question of criminal responsibility must be considered by the jury in each individual case on the basis of all the relevant evidence given by medical and other witnesses. It is not possible to define in medical terms any category of mental disease which should always, and without exception, exempt an offender from responsibility; and there must always be doubtful and borderline cases, where it will be difficult to decide whether the accused ought to be held wholly irresponsible, either because it is difficult to diagnose his mental condition at the time of the offence or because it is difficult to judge how his mental condition affected his responsibility for his actions. Nevertheless, where a grave crime is committed by a person who is suffering from a psychosis and is so grossly disordered mentally that, in the opinion of experienced medical men, he could properly be certified as insane, the presumption that the crime was wholly or largely caused by the insanity is, in ordinary circumstances, overwhelmingly strong. It cannot indeed be maintained that if a person is certified, or certifiable, as insane, he should necessarily be held irresponsible in all cases, mainly because, as was pointed out in paragraph 274, certification is sometimes determined by pragmatic considerations; it may be necessary to certify a patient whose mental disorder is comparatively slight in order to ensure that he should receive proper care and treatment. But cases will be extremely rare in which an accused person ought to be held criminally responsible when he is certifiable as insane and there is no reason to think that his condition was materially different at the time of the crime.

After the most careful inquiry and research[3] the Commission came to the conclusion that the test of responsibility laid down in England by the M'Naghten Rules was so defective that the law ought to be changed.[4] It concluded that the best way to do this was by abrogating the rules and leaving to the jury the question as to 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. That is, the Commission preferred to reject the M'Naghten Rules in favour of a conclusion more in keeping with the New Hampshire rule. As a less preferable alternative, the Commission suggested adding another test to the present tests covered by the words "was incapable of preventing himself from committing it".[5]

33. The Gowers Commission stated the New Hampshire Rule in the appendix to its Report,[6] but its Report does not indicate what study, if any, was made of it. However, one would gather from reading the Report that the Commission considered a causal connection necessary to create responsibility. At page 99, para. 280, we read:

> 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.

The statement goes on to show why the Commission chose to base its new criterion on degree:

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[1] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 98, para. 279.
[2] Ibid., p. 101, para. 286.
[3] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, Chapter 4, pp. 73-129.
[4] Ibid, p. 275.
[5] For the conclusions in detail of the Gowers Commission relating to insanity as a defence, which are set out in Chapter 14 of its Report, pp. 275-6, para. (13) to (22) inclusive, see Appendix B to Memorandum of Dissent.
[6] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 411, para. 11.

On the other hand, few persons, if any, would go so far as to suggest that anyone suffering from any mental abnormality, however slight, ought on that ground to be wholly exempted from responsibility under the criminal law. It therefore becomes necessary for the law to provide a method of determining what kind and degree of mental abnormality shall entitle offenders to be so exempted; and also to decide what account shall be taken of lesser degrees of mental abnormality, whether by way of mitigation of sentence or otherwise.

34. It follows then that the mere presence of disease of the mind does not relieve a person of responsibility for a crime. Many forms of disease of the mind do not lead to criminal acts. Nor do the majority of people who suffer from mental disease engage in anti-social behaviour. To absolve from responsibility under the New Hampshire Rule, the criminal act must be shown to be a product of the disease of the mind. As modified by our own rule as to the burden of proof, the questions to be asked the jury along with appropriate instructions as to the burden of proof might be put in different ways, for example:

1. Did the accused commit the act?

2. If he did commit the act, did he have a disease of the mind at the time he committed it?

3. If so, was the act the offspring or product of such disease of the mind?

Or, in the alternative, question 3 might be put as stated by Ladd J. in State v. Jones (see para. 23, ante):

3. If so, was the disease of such a character or was it so far developed, or had it so far subjugated the powers of the mind as to take away the capacity to form or entertain a criminal intent?

In either event, if the answer to all three questions is "yes", then the verdict must be "Not guilty by reason of insanity". In the event of the accused omitting to do a necessary act or in the event of it being claimed that he was mentally deficient, the questions would have to be reworded to fit those circumstances.

35. The rule proposed by the Gowers Commission is as follows:

> No person shall be convicted of an offence in respect of an act or omission on his part done or omitted while he is mentally defective or has disease of the mind to such a degree that he ought not to be held responsible.

The questions under such a rule would be:

1. Did the accused commit the act?

2. If he did commit the act, did he have a disease of the mind at the time he committed it?

3. If so, was his disease of the mind of such a character or degree as to take away his capacity to form or entertain a criminal intent?

Or perhaps a better wording for this last question might be:

3. If so, was his disease of the mind of such a character or degree that he ought not to be held responsible?

36. We believe that the issues under the New Hampshire rule and the rule proposed by the Gowers Commission are fundamentally the same, that both rest on the capacity to form guilty intent. The chief virtue of both rules is that they treat irresponsibility arising from mental abnormality as a pure question of fact. Since neither rule is based on specific symptoms to the exclusion of other symptoms, they permit the jury to consider other aspects affecting the behaviour of a psychotic person than cognition, for example, the will and the emotions. Also they permit the psychiatrist to come into court in a normal way as an expert witness and to speak in meaningful terms. The M'Naghten Rules prevent him from using his skill in a significant way. An important advantage of either of these rules over the present law is that they allow for the advance of medical science without requiring amendment.

CHAPTER IV

DIMINISHED RESPONSIBILITY

37. The idea of providing for diminished responsibility of persons charged with crime is already recognized in Canada by section 204 and section 570 of the Criminal Code. Section 204 was formerly section 262 and was enacted by 1948, Statutes of Canada, c. 39, s. 7. The former section created the crime of infanticide to overcome the necessity of charging the mother of murder of her newborn child. It was taken from an English statute, The Infanticide Act, 1922, c. 18, which provided that, on a charge of murder against a woman who has caused the death of her newborn child, the jury might bring in a verdict of infanticide if, at the time, the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child. In that event, she was to be dealt with and punished as if she had been guilty of manslaughter of such child. That Act was replaced in 1938 by a new Act, c. 36, extending the application of the provision to children up to twelve months of age and including an extra ground for the defence, namely, that the balance of the mother's mind was disturbed by reason of the effect of lactation consequent upon the birth of the child. Our present section 204 C.C. covers both grounds. The English statute is a good example of the theory of diminished responsibility. There were, however, prior to the enactment of s. 570 of the present Code, grave defects in our law,[1] as pointed out by McRuer C. J. H. C. (Ont.) in Rex v. Marchello[2] and as demonstrated in R. v. Jacobs.[3] Section 204 reads:

> A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect or lactation consequent on the birth of the child her mind is then disturbed.

Section 262 made infanticide a substantive offence and not a lesser verdict on a murder charge. The result was much more sweeping than was intended. A woman tried here on a charge of infanticide under section 262 would have had a perfect defence if it had been clear from the evidence that she had fully recovered at the time of the act and intended to kill the child. Having been tried on the facts and acquitted, the doctrine of "autrefois acquit" would have applied and she could not have been afterwards indicted for murder. The present section 570 was intended to overcome that grave defect. It reads as follows:

> Where a female person is charged with infanticide and the evidence establishes that she caused the death of her child but does not establish that, at the time of the act or omission by which she caused the death of the child,
>
> (a) she was not fully recovered from the effects of giving birth to the child or from the effect of lactation consequent on the birth of the child, and
>
> (b) the balance of her mind was, at that time, disturbed by reason of the effect of giving birth to the child or of the effect of lactation consequent on the birth of the child,
>
> she may be convicted unless the evidence establishes that the act or omission was not wilful.

Section 569 of the present Code also permits a verdict of infanticide to be found by the jury, as is the case in England, on a charge of murder when the facts warrant it. It permits as well a verdict of disposing of the body with intent to conceal the fact of birth on a charge of either murder or infanticide where the facts warrant it. As the law now stands, the provisions of the Code relating to infanticide provide a good example of diminished responsibility.

38. Where murder is charged in Canada and the defence of insanity has failed, the doctrine does not apply. No consideration may be given by the court to the mental state of the accused as a basis of reducing the verdict to manslaughter (or in passing sentence) even though the prisoner may be certifiably insane. There is only one verdict, murder (and only one sentence, capital punishment). This situation disturbs the public conscience and points logically to the extension in this field of the principle of diminished responsibility.

[1] S. 204 C.C.
[2] (1951) O.W.N. 316.
[3] 105 C.C.C. 291.

39. Sir James Stephen thought a similar situation in England a grave defect in the law. In his "History of the Criminal Law of England"[1] he wrote that diseases of the brain may just

> . . . cause definite intellectual error, and if they do so their legal effect is that of other innocent mistakes of fact. Far more frequently they affect the will be either destroying altogether, or weakening to a greater or less extent, the power of steady calm attention to any train of thought, and especially to general principles, and their relation to particular acts. They may weaken all the mental faculties, so as to reduce life to a dream. They may act like a convulsion fit. They may operate as resistible motives to an act known to be wrong. In other words they may destroy, they may weaken, or they may leave unaffected the power of self-control.
>
> The practical inference from this seems to me to be that the law ought to recognize these various effects of madness. It 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.

40. In the United States, where there are degrees of murder, six states[2] have recognized the principle of diminished responsibility in cases of mental weakness falling short of legal insanity and reduced the conviction in such a case to second degree murder. No state appears to have gone so far as to permit reduction of murder to manslaughter on that ground.[3]

41. In Scotland the principle of diminished responsibility has been tried in practice and has been found to work satisfactorily. It is confined to cases in which murder is charged and we would so confine it. We have no authority under our terms of reference to go further afield than its relationship to mental abnormality. As used in Scotland it is

> . . . a device to enable the courts to take account of a special category of mitigating circumstances in cases of murder and to avoid passing sentence of death in cases where such circumstances exist.[4]

The principle is a logical development of Sir George Mackenzie's "rule of proportions" which dated back to the fifteenth century and which recognized the obligation on the part of the law to deal not only with the clear cases of criminal responsibility and irresponsibility but with the intermediate cases as well.[5] It and the subsequent doctrine of diminished responsibility provided a means whereby mental abnormality arising from emotional factors could be considered. Both of these doctrines recognized that, since the sense of perception in such cases was diminished, so the responsibility should be, and both were part of the development of the common law in Scotland. The recognition of the doctrine of diminished responsibility as one distinct from the earlier rule of proportions dates back to the case of H. M. Advocate v. Dingwall[6] where Lord Deas directed the jury that they might treat the crime as falling short of murder on the ground of the weakness of mind of the prisoner, who had suffered from epileptic fits. Lord Justice Cooper gave an excellent statement of the doctrine in addressing the jury in the more recent case of H. M. Advocate v. Braithwaite:[7]

> ' . . . even if a man charged with murder is not insane, still our law does recognize . . . that, if he was suffering from some infirmity or aberration of mind or impairment of intellect to such an extent as not to be fully accountable for his actions, the result is to reduce the quality of his offence in a case like this from murder to culpable homicide.

Under the Scottish doctrine the onus on the accused is only to satisfy the jury that the balance of probability on the evidence is in favour of the view that his accountability and responsibility were below normal.[8] There has been a corresponding reduction in the number of cases going to the Secretary of State for medical inquiry following conviction.[9]

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[1] (1883), vol. 2, p. 174.
[2] Connecticut, Illinois, Rhode Island, Utah, Virginia and Wisconsin.
[3] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 413, para. 14.
[4] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 144, para. 413.
[5] Psychiatry and the Law, Hoch and Zubin, Grune & Stratton Press, New York-London-1955.
[6] (1876) 3 Cowper 335.
[7] (1945) J. C. 55.
[8] R. v. Braithwaite, (1945) J. C. 55; Report of Royal Commission on Capital Punishment in Great Britain, 1949-1953, p. 131, para. 378.
[9] Report of Royal Commission on Capital Punishment in Great Britain, 1949-1953, para. 377.

42. In the Commonwealth, in India and Pakistan, the court may regard diminished responsibility as a reason for passing a sentence of life imprisonment instead of the death sentence. In Western Australia, diminished responsibility is ground for recording instead of pronouncing the death sentence. In South Africa and Southern Rhodesia, it may be regarded by the jury as an extenuating circumstance.[1]

43. The principle was recommended by some of the witnesses who appeared before our Commission and by some associations represented at the Commission hearings. Dr. Charles Martin, Que., pointed out that the principle of diminished responsibility is already recognized in the case of infanticide.[2] Professor M. Cohen, Que., Chairman of the Committee on Research of the John Howard Society of Quebec, Inc., who spoke for himself and the Society, said:[3]

> We recognize the need to have workable rules for the administration of criminal justice. This means that Courts must have practical methods to determine with reasonable directness the conditions under which an accused will be held:
>
> (a) Responsible
>
> (b) Not responsible
>
> (c) To have lessened or limited responsibility.
>
> The M'Naghten Rules provide only a rough guide to a division between full responsibility and no responsibility. If the Courts could be given a workable guide to "limited or lessened responsibility", there would be less need for the harsh and perhaps antiquated "either/or" classification represented by the M'Naghten Rules.

Mr. Norman Borins, Q.C., Ont., [4] recommended a careful study of the Scottish doctrine of diminished responsibility and suggested its adoption in the event that his alternative recommendations of enlargement of the rules or abrogation were not accepted.[5] Mr. John T. Carvell, N.B., Chairman of the Criminal Law Section, New Brunswick Division, of the Canadian Bar Association, speaking on his own behalf and for the Criminal Law Section, was opposed to leaving mitigation to the executive following sentence,[6] and favoured adopting the principle of diminished responsibility reducing murder to manslaughter where there is a serious impairment of mental faculty and insanity as a defence fails.[7] Some of the judges in private session raised the question of diminished responsibility. The Canadian Bar Association submitted a resolution following its Annual Meeting in 1955 to the Commission recommending that

> . . . a doubt concerning the capacity to form the necessary intention even though it is based on insanity evidence should be resolved in favour of an accused in reducing what would otherwise be murder to manslaughter.

It was not made clear whether the suggested amendment was to be made to section 16 or to section 203, and it may be that that feature of the problem was not explored by the Association. Under the Scottish law, as already pointed out, the burden of proof is on the accused, who has only to satisfy the jury by a balance of probabilities in his favour of the view that his accountability and responsibility were below normal.[8] Under section 203, as pointed out in the Report,[9] the burden of proof beyond reasonable doubt of the opposite proposition would fall on the Crown. We are approving of the Scottish law, which would be accomplished by amendment to section 16.

44. We look on the adoption of the theory of diminished responsibility as a means of ensuring that persons of border-line types should be less severely punished than sane persons. No matter what the law will be, section 16 amended or the New Hampshire rule, there will always be border-line cases to be considered.

45. One objection put forward to the adoption of the principle of diminished responsibility was that the sentence would be to a penal institution where there are not proper facilities

[1] Ibid., p. 413, para. 13.
[2] Evid. pp. 1154-5.
[3] Exhibit 26, para. 3, p. 1226-A9.
[4] Evid., Exhibit 39-A, p. 1816.
[5] Evid. p. 1475.
[6] Evid. p. 171.
[7] Exhibit 8, Evid. p. 99.
[8] Report of the Royal Commission on Capital Punishment in Great Britain, 1949-1953, para. 378.
[9] At p. 69.

for the care and treatment of mental cases. There are three answers to that objection: (1) It is now possible to have a prisoner certified in a proper case as insane and have him transferred to a mental institution; (2) it is to be hoped that the time is not far distant when there will be proper psychiatric facilities in all penal institutions for the care of the mentally ill prisoners; and (3) the fact that a sentence of a mentally impaired person might be served in a penal institution is surely no argument against the sentence when the alternative is capital punishment. It is to be noted that, even if the royal prerogative of mercy were extended instead, the sentence would have to be served in a penal institution unless circumstances required removal to a mental institution by the prison authorities. In any event, whether a person is found not guilty on account of insanity or is found to have diminished responsibility for his act or omission, proper safeguards should be set up to ensure that he will not be returned to society while he is still a danger to the public by reason of his mental incapacity.

46. No matter what the law may be or whether the principle of diminished responsibility in these cases is adopted or not, no one would ever suggest doing away with the royal prerogative of mercy, which is a necessary part of the administration of our criminal law.

APPENDIX B

ROYAL COMMISSION ON CAPITAL PUNISHMENT IN GREAT BRITAIN

(1949-1953)

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS RELATING TO INSANITY AS A DEFENCE

(Report, pages 275-276)

INSANITY AND MENTAL ABNORMALITY CRIMINAL RESPONSIBILITY

Insanity

Fitness to Plead

(13) We recommend no change in the practice followed in England in regard to raising the issue of insanity on arraignment (paragraph 224), except that we endorse the recommendation of the Atkin Committee that an accused person should not be found insane on arraignment except on the evidence of at least two doctors, save in very clear cases (paragraph 225).

(14) No change is recommended in the practice of raising the issue of insanity in bar of trial in Scotland (paragraph 255) (except in relation to mental deficiency — see recommendation (21) below).

Insanity as a Defence

(15) It has for centuries been recognised that, if a person was, at the time of committing an unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law. We assume the continuance of this ancient and human principle (paragraph 278).

(16) ANY TEST OF CRIMINAL RESPONSIBILITY MUST TAKE ACCOUNT OF THE FACT THAT, WHERE A GRAVE CRIME IS COMMITTED BY A PERSON WHO IS SO GROSSLY DISORDERED MENTALLY THAT HE COULD PROPERLY BE CERTIFIED AS INSANE, THE PRESUMPTION THAT THE CRIME WAS WHOLLY OR LARGELY CAUSED BY THE INSANITY IS, IN ORDINARY CIRCUMSTANCES, OVERWHELMINGLY STRONG, AND THERE IS AN EQUALLY STRONG PRESUMPTION IN THE CASE OF THE GROSSER FORMS OF MENTAL DEFICIENCY AND OF CERTAIN EPILEPTIC CONDITIONS (paragraphs 286 and 287).

(17) WE CONSIDER (WITH ONE DISSENTIENT) THAT THE TEST OF RESPONSIBILITY LAID DOWN IN ENGLAND BY THE M'NAGHTEN RULES IS SO DEFECTIVE THAT THE LAW ON THE SUBJECT OUGHT TO BE CHANGED (paragraphs 296 and 332).

(18) IF AN ALTERATION WERE TO BE MADE BY EXTENDING THE SCOPE OF THE RULES, WE SUGGEST THAT A FORMULA ON THE FOLLOWING LINES SHOULD BE ADOPTED:—

> "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." (paragraph 317).

ALTHOUGH THIS FORMULA MIGHT NOT PROVE WHOLLY SATISFACTORY, WE CONSIDER (WITH ONE DISSENTIENT) THAT IT WOULD BE BETTER TO AMEND THE RULES IN THIS WAY THAN TO LEAVE THEM AS THEY ARE (paragraph 333).

(19) WE CONSIDER (WITH THREE DISSENTIENTS) THAT A PREFERABLE AMENDMENT OF THE LAW WOULD BE TO ABROGATE THE M'NAGHTEN RULES AND LEAVE THE JURY 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 (paragraph 333, and memorandum of dissent (p. 285) (see recommendation (21) below).

(20) NO AMENDMENT OF THE EXISTING LAW OF SCOTLAND WITH REGARD TO CRIMINAL RESPONSIBILITY IS NECESSARY (paragraph 333) (except in relation to mental deficiency—see recommendation (21) below).

Mental Deficiency

(21) THE TESTS OF INSANITY ON ARRAIGNMENT (OR IN SCOTLAND OF INSANITY IN BAR OF TRIAL) AND OF INSANITY AS A DEFENCE SHOULD MAKE NO DISTINCTION IN LAW BETWEEN MENTAL DEFICIENCY AND INSANITY (paragraphs 342 and 356). IN PRACTICE THERE ARE WIDE VARIATIONS OF MENTAL CAPACITY AND OF RESPONSIBILITY AMONG MENTAL DEFECTIVES; AND IT WILL BE FOR THE JURY TO DECIDE IN EACH CASE WHETHER THE DEGREE OF MENTAL DEFECT IS SUCH THAT THE ACCUSED OUGHT TO BE HELD UNFIT TO PLEAD OR NOT CRIMINALLY RESPONSIBLE (paragraphs 348 and 357).

Statutory Medical Inquiries

(22) The power of the Home Secretary to hold a statutory medical inquiry under section 2 (4) of the Criminal Lunatics Act, 1884, into the state of mind of a person sentenced to death should be maintained (paragraph 372).

APPENDIX C

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APPENDIX I

ORGANIZATIONS INVITED TO MAKE REPRESENTATIONS

Academy of Medicine, Toronto.
Alberta Psychiatric Association.
Association des Medecins de langue française.
Attorney General of each Province (personally or through a nominee).

Bar of the Province of Quebec.
Barristers' Society of New Brunswick.

Canadian Association of Social Workers.
Canadian Bar Association.
Canadian College of General Practice.
Canadian Medical Association.
Canadian Medical Protective Association.
Canadian Mental Health Association.
Canadian Psychiatric Association.
Canadian Psychological Association.
Catholic Rehabilitation Service.

Dalhousie College and University.

John Howard Societies.

Laval University.
Law Society of Alberta.
Law Society of British Columbia.
Law Society of Manitoba.
Law Society of Newfoundland.
Law Society of Prince Edward Island.
Law Society of Saskatchewan.
Law Society of Upper Canada.

Manitoba Law School.
McGill University.
Medical Council of Canada.
Medico-Legal Society of Toronto.
Mental Hygiene Institute.

Newfoundland Psychiatric Society.
Nova Scotia Barristers' Society.

Ontario Neuro-Psychiatric Association.
Osgoode Hall Law School.

Provincial Colleges of Physicians and Surgeons.
Provincial Health Departments and Mental Health Services.
Provincial Medical Councils and Boards.

Queen's University.

Royal Canadian Mounted Police.
Royal College of Physicians and Surgeons of Canada.

Saskatchewan Psychiatric Association.
Service de Readaptation Sociale, Inc.
Société d'Orientation et de Réhabilitation Sociale.
Society for Scientific Treatment of Criminals.
University of Alberta.
University of British Columbia.
University of Manitoba.
University of Montreal.
University of New Brunswick.
University of Saskatchewan.
University of Toronto.
University of Western Ontario.

APPENDIX II

ORGANIZATIONS WHICH MADE REPRESENTATIONS

Alberta Psychiatric Association.
Attorney General of British Columbia.
Attorney General of Nova Scotia.
Attorney General of Ontario.
Attorney General of Quebec.

Canadian Bar Association:
- Committee on the Administration of Criminal Justice of the British Columbia Section.
- Criminal Justice Section, New Brunswick Division.
- Nova Scotia Sub-Committee on the Rules in M'Naghten's Case.
- Nova Scotia Subsection of the Criminal Justice Section.

Canadian Mental Health Association.
Canadian Medical Association.
Canadian Psychiatric Association.
College of Physicians and Surgeons of Alberta.

John Howard Society of Nova Scotia.
John Howard Society of Quebec, Inc.

McGill University (Faculty of Law).

Mental Health Services of the Provinces of Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan.

Newfoundland Psychiatric Society.

Province of Quebec Psychiatric Association.

Saskatchewan Psychiatric Association.

University of Alberta (Faculty of Law and Faculty of Medicine).
University of British Columbia (Faculty of Law).
University of Manitoba (Faculty of Medicine).
University of Toronto (Faculty of Medicine).

Welfare Council of Halifax.