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François Lareau
18 avril 2010

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APPENDIX "CODE-7"

SUBMISSION TO THE
PARLIAMENTARY SUBCOMMITTEE ON
RECODIFICATION OF THE CRIMINAL LAW

MENTAL DISORDER, DIMINISHED RESPONSIBILITY AND AUTOMATISM

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October, 1992

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I. INTRODUCTION

1. On October 14, 1991 I appeared as a witness before the Standing Committtee on Justice and the Solicitor General in regard to Bill C-30 (Mental Disorder). At that time, I recommended a number of changes to Bill C-30 in regard to the mental disorder defence. Members of the Standing Committee considered my suggestions with interest, but suggested that they should be carefully considered at the time the Subcommittee looked at recodification of the Criminal Code. I am pleased to submit these ideas for your consideration.

2. I should also like to add that I was a member of the CBA Task Force Report on "Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code". I am in agreement with the position which the CBA Task Force takes in regard to the defence of mental disorder, but I have some further additions and elaborations to make.

II. SCOPE OF THE MENTAL DISORDER DEFENCE

A. <u>Include Volitional Incapacity</u>

3. Bill C-30 (which was proclaimed in force, February 4, 1992) abolished s. 16 and replaced it with a revised s. 16. The revised s. 16 modernizes the language of s. 16 but does not broaden the scope of the mental disorder defence. Section 16 is currently restricted to cognitive incapacity. <u>To exclude volitional incapacity from the scope of s. 16 is contrary to principles of fundamental justice.</u> Therefore I recommend that s. 16 be amended by adding:

"or incapable of conforming to the requirements of the law"

This same recommendation is also made in the CBA Task Force Report (p. 59 and 68-69).

Comments:

4. The Law Reform Commission of Canada notes that "the defence of insanity rests on the fundamental moral view that insane persons are not responsible for their actions and are not therefore fit subjects for punishment." I agree. But why are they not responsible? The answer to that question will provide the proper parameters or scope for the mental disorder defence. Unfortunately, the Commission did not directly pursue the answer to that question (although they were not unaware of the answer).

5. Put simply, our principles of criminal law and criminal sanctions are based on an assumption about human nature – the assumption that human beings are rational and autonomous. We have the capacity to reason right from wrong, and the capacity to choose right or wrong. These assumptions may be incorrect, but they are, and are likely to remain, the theoretical basis of our criminal law. It is these dual capacities – reason and choice -- which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution of responsibility and punishment is morally justified or deserved when that person consciously chooses wrong. The Supreme Court has frequently acknowledged the necessity of both capacities reason and choice as the foundation for criminal responsibility and punishment. For example, in Swain, Lamer C.J.C. stated (at C.c.C. 205) that "one of the basic assumptions of our criminal law model" is "that the accused is a rational autonomous being who is capable of appreciating the nature and quality of an act and of knowing right from wrong."

McLachlin, J. (dissenting) makes similar comments in Chaulk at C.C.C. 262-63. Impairment of the capacity to choose is recognized in other defences: automatism, provocation, necessity, duress. It should also be recognized in the mental disorder defence.

6. If criminal law is based on a conception of human beings as rational and autonomous individuals, then both conditions – reason and will – are relevant to attributing criminal responsibility to an individual. It is the ability to reason (right from wrong) and the ability to choose (to do right or wrong) which provides the moral justification for imposing criminal responsibility and punishment. If there is no ability to reason, or no ability to choose, then responsibility for one's conduct is impossible to establish and punishment for that conduct would be immoral. It is for this reason that the mental disorder test must include, at least on philosophic grounds, some consideration of both cognitive and volitional impairment.

7. The law does not assume that everyone has the same capacity to reason, to choose or to control their conduct. However, provided a minimal capacity for reason and control exists, every citizen is expected to conform his or her behaviour to the requirements of the law. When a citizen possesses the minimum required capacities for reason and control yet fails to control his or her conduct, responsibility can be assigned and punishment can be imposed as a just dessert for this failure. As reasoning human beings, we are expected to control our conduct and to resist the inclination to act illegally during states of anger, jealousy, greed, etc.

8. Since the mental disorder defence results in total exemption from criminal liability, the level of impairment warranting a finding of insanity ought to be set at a level where it is *unreasonable* to attribute *any* blame to the accused for failing to conform to the requirements of the law. For lesser

impairments, where it is reasonable to attribute *some* blame to the accused (though not total blame), I favour a system of diminished responsibility.

9. Bill C-30 failed to add volitional impairment as part of the mental disorder test. In the government's *Discussion Paper* (1983), a wide range of possible mental disorder tests were canvassed, including the volitional impairment test. In its *Final Report* (1985), the government recommended "that for the time being the current insanity test be retained," subject to minor word changes.

10. The government's conclusions are based on two factors:

(i) there is some evidence that the precise wording of the mental disorder defence is largely irrelevant; that judges and juries largely ignore the precise wording of the test and apply a more general, intuitive standard;

(ii) the government's consultations with psychiatrists, provincial governments, provincial mental health review boards and various law and mental health associations revealed that "views were quite diverse" on the appropriate test, (although there was "significant support" for including volitional impairment) and "many groups made strong representation that further review is necessary."

11. Thus, the government concluded that the current insanity test should be retained, in light of "the disparity of views", and the fact that there is no conclusive evidence that broadening the insanity test to include volitional impairment would alter what judges and juries already do.

(i) It is true that there is some evidence (mostly from the United States) that the precise wording of the insanity defence may be largely irrelevant, but that evidence is neither extensive, nor very conclusive; it is a pity that neither the LRCC nor the government has conducted any empirical examination of that question with judges and/or mock juries.

(ii) If it is true that the precise wording is largely irrelevant, then why not extend the insanity test to volitional impairment; at least then it would be theoretically or morally sound, even if the practical results were largely the same.

(iii) The fact that the government found that views on the proper scope of the insanity test were "quite diverse" is not, by itself, a very compelling reason to recommend that the current insanity defence be retained; there is no evidence that the current test is more acceptable to lawyers or psychiatrists than an insanity test which includes volitional impairment.

12. There is a concern that psychopaths may be too easily found not guilty by reason of insanity based on volitional incapacity. By 1980, volitional impairment was included in the insanity defence of 28 states and 10 of the 11 federal district circuits. In Australia, volitional impairment is included in the Criminal Code in the three code states and recognized at common law in the three non-Code states. In none of these jurisdictions has the concern that psychopaths will be too easily found not guilty by reason of insanity actually occurred.

13. Another concern is that judges and juries are incapable of distinguishing between persons who are incapable of conforming to the requirements of law and those who are capable of so conforming but simply choose not to conform (or as the LRCC says: "the difficulty of distinguishing impulses which are irresistible from those which are merely unresisted"). I agree that making this distinction will not always be easy. But I do not agree that

judges or juries are incapable of distinguishing between cases of incapacity to conform and wilful or reckless failure to conform.

(i) the incapacity to conform must arise from a mental disorder, thus there will be expert psychiatric or psychological evidence on this point for the benefit of the judge or jury;

(ii) judges and juries are frequently called upon to decide upon the mental state or ability of the accused; in most crimes, the Crown must prove beyond a reasonable doubt that the accused had a particular mental state at the time of the offence - e.g. intention, knowledge, purpose or recklessness. Since the judge or jury cannot crawl inside the mind of the accused, the judge or jury must decide what was in the mind of the accused by drawing reasonable inferences from what the accused said and did, and from all the other circumstances surrounding the commission of the offence.

The same process can and will apply to determining incapacity to conform to the requirements of the law.

14. As a purely political choice, leaving the mental disorder defence unchanged may be an attractive option. There may be little or no public sympathy for widening the mental disorder defence. Including volitional impairment in the mental disorder defence could easily be characterized by the media as "going soft" on dangerous criminals. The public sometimes meets a not responsible due to mental disorder verdict with incredulity - with a sense that the accused somehow "got off" or "beat the system".

However, I think these misconceptions should not be carried into the Parliamentary process and serve as an obstacle to recognizing within the mental disorder defence the dual, morally required capacities of criminal responsibility - cognition and volition.

8. The Meaning of Wrong

15. I recommend that section 16 be amended to make it clear that the word "wrong" in section 16 includes both legally and morally wrong. This can be achieved by redrafting section 16 or by including a definition of "wrong" in section 2 of the Criminal Code. I prefer the former approach (as did the LRCC in their minority recommendation in Report 31). The Canadian Bar Association Task Force also adopts this approach (at p. 59 of its Report).

16. Section 16 redrafted might read as follows:

> No one is criminally responsible for conduct if, due to mental disorder at the time of that conduct, the person
>
> a) was incapable of appreciating the nature, consequences or legal wrongfulness of that conduct; or
>
> b) believed what he/she was doing was not morally wrong; or
>
> c) was incapable of conforming to the requirements of the law.

Comments:

17. In Schwartz (1976), 29 C.C.C. (2d) 1, the Supreme Court of Canada held that the word "wrong" in section 16 means legally wrong, not morally wrong. In Chaulk (1990), 62 C.C.C. (3d) 393, the Supreme Court overruled Schwartz and held that "wrong" means "morally wrong" in the sense of being wrong by the ordinary moral standards of reasonable persons.

18. For both clarity and comprehensiveness, the legislative definition of the mental disorder defence should include both legally and morally wrong, not one or the other.

19. The Supreme Court's view that "morally wrong" should be measured by the objective standards of reasonable persons is unfair and inappropriate. According to the Supreme Court in Chaulk, the accused can not be acquitted

on the grounds of insanity if he/she was capable of knowing that his/her conduct would be considered wrong in the eyes of ordinary persons even though he/she personally believes that such conduct is not morally wrong.

20. This test of objective morality is inappropriate and unfair because it expects a mentally disordered person to act logically and rationally like other reasonable persons would, at a time when that person's mental processes, perceptions and judgements are impaired by mental disorder.

21. In my opinion, the Law Reform Commission in Working Paper 29 aptly summarized why the test for wrong should include what the accused believed was wrong:

> "First, common-law tradition, it seems, saw wrong' as meaning 'morally wrong' and contrary interpretations are of recent vintage. Second, the term 'wrong' in the analogous rule about children - that children between seven and fourteen cannot be convicted unless they appreciate that their conduct was wrong - has generally been taken to refer to moral wrongfulness. Finally, and most important, the key point to remember is that in such situations the accused suffers from disease of mind. This being so, to inquire how far he knew the law makes little sense. What matters are his motives and his overall perception of the permissibility of his action. The question for the jury is whether mental illness so obstructed the thought processes of the accused as to make him incapable of knowing that his acts were morally wrong. The argument is sometimes advanced that a moral test favours the amoral offender and that the most favoured will be he who had rid himself of all moral compunction. This argument overlooks the fact of disease of the mind. If, as a

result of disease of the mind, the offender has lost completely the ability to make moral distinctions and acts under an insane delusion, it can well be said that he should not be criminally accountable."

It is also worth noting that M'Naghten's Case had it right on this point, when the judges stated: "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable." There is no suggestion that the accused must do what he thinks others might think is right, rather than what he personally believes is right!

22. In *Report 31*, a majority of the LRCC agreed upon the "legally wrong" option. A minority of the Commissioners would have added the morally wrong test on the basis that "although in general a person cannot be allowed to substitute his views of right and wrong for those contained in the law, nevertheless a mentally disordered person who acts as he does because he thinks it morally right to do so, merits treatment rather than punishment." The majority gave no explanation for why it adopted the legally wrong test, nor did it provide any rebuttal in regard to the arguments which favour inclusion of the morally wrong test. [Likewise the federal government in its 1984 Report on Mental Disorder gave no reason for not including morally wrong in the definition of insanity.]

C. The Meaning of "Mental Disorder"

23. Bill C-30 replaced the words "natural imbecility or disease of the mind" in section 16 of the Code with the words "mental disorder". Bill C-30 also defined mental disorder as "a disease of the mind". Natural imbecility was

included in the original section 16 to ensure that the benefit (or burden) of the insanity defence was available to mentally retarded persons (who, at least in medical terms, do not have "a disease"). Although the Supreme Court of Canada in Cooper and Rabey has given a broad definition to "disease of the mind" [broad enough presumably to include mental retardation or disability] it would be safer to define mental disorder as "disease of the mind or mental disability", and thereby make it clear that mental disability [retardation] is included within the insanity defence. This recommendation is also found in the CBA Task Force Report at 60-61. I recommend that the definition of mental disorder in s. 2 of the Code be revised to expressly include "mental disability".

D. Mental Disorder and Automatism

24. I have a more important criticism of defining the words "mental disorder" as simply "a disease of the mind". This definition does nothing to distinguish between the two separate defences of mental disorder and non-insane automatism.

25. Canadian case law (which is conveniently summarized in Rabey (1977), 37 C.C.C. (2d) 461, aff'd (1980), 54 C.C.C. (2d) 1 by Martin, J.A. (Ont. C.A.) and Dickson, J. (S.C.C.) and in D. Stuart, Canadian Criminal Law (2nd ed., 1987) at pp. 89-91) has classified the following factors as external causes of unconscious behaviour entitling the accused to rely on the defence of automatism:

a) a concussion caused by a physical blow;

b) a psychological blow from an extraordinary external event which might reasonably be expected to cause a dissociative state in an average normal person;

c) inhalation of toxic fumes, accidental poisoning or involuntary intoxication;

d) sleepwalking;

e) a stroke;

f) hypoglycaemia; or

g) a flu or virus.

However, Canadian cases have held that the accused may not rely on the defence of automatism if the unconscious behaviour is caused amongst other things by

a) cerebral arteriosclerosis;

b) some instances of epilepsy; or

c) the ordinary stresses and disappointments of life.

26. A provision which clearly distinguishes between the defences of mental disorder and non-insane automatism should be added to the Criminal Code. The CBA Task Force has provided such a provision in its definition of automatism in s. 7(2) at p. 19 and 28-29 of its Report. I agree with that recommendation.

E. Nature and Quality Versus Nature and Consequences

27. In paragraph 16, I recommend the addition of the word "consequences" in the definition of mental disorder. In *Working Paper 29* and *Report 31*, the Law Reform Commission has replaced the expression "nature and quality" of an act or omission with the expression "nature or consequences" of the conduct. This change properly embodies the case law interpretation (from Barnier and Kjeldsen) of the words "nature and quality" which are now used in section 16(2) of the *Criminal Code*. The CBA Task Force (p. 59) also recommends "nature or consequences". I agree. It is surprising that Bill C-

30 did not change the words "nature and quality" to "nature or consequences". In case anyone thinks the word "quality" adds anything to "nature", the expression could be changed to "nature, quality or consequences".

III. ONUS AND QUANTUM OF PROOF

A. Introduction and Recommendation

28. Section 16(2) and section 16(3) of the Criminal Code presume that an accused is legally sane (not suffering from a mental disorder so as to be exempt from criminal responsibility), until the contrary is proved on a balance of probabilities by the person raising the mental disorder defence.

29. When an accused raises the mental disorder defence, the above provisions mean that the accused must establish the mental disorder defence on a balance of probabilities. This reverse onus is an historic anomaly, unfair to the accused, unnecessary as a matter of policy, and an irrational exception to the ordinary onus of proof. For these reasons, it should be abolished when the defence of mental disorder is raised by the accused. If the Crown is permitted to raise the mental disorder defence against the accused's wishes, the Crown should be required to prove the mental disorder defence *beyond a reasonable doubt*. The CBA Task Force (p. 66-68) comes to the same conclusion. [I also agree with Lamer, C.J.C. in Chaulk (C.C.C. at 217) where he states that "assuming ... that the Crown may constitutionally raise the issue of insanity, ... there is no reason why the burden of proof on the accused and on the Crown must necessarily be the same."]

30. In Chaulk, a majority of the Supreme Court held that this reverse onus violates the presumption of innocence in the Charter (s. 11(d)) but that this

violation is a reasonable limit under section 1. I disagree with the majority on this point and instead I side with Justice Bertha Wilson who held, in dissent, that this reverse onus is not a reasonable or necessary limit on the presumption of innocence and therefore is contrary to the Charter. Whether one agrees with the majority, or with Wilson, J., it should be remembered that the majority of the Supreme Court did not say that Parliament should reverse the onus as a matter of sound policy, but rather if Parliament decides to reverse the onus that will not violate the Charter.

B. Historic Anomaly

31. Professor Fletcher, in his seminal book, Rethinking Criminal Law, traces historically the allocation of burden of proof in criminal cases. He notes the common law rule, espoused by Foster and Blackstone, that the defence had to prove "circumstances of justification, excuse and alleviation" was designed for cases tried on a special verdict on the facts, not cases of a general verdict on the defendant's guilt. He explains that the shift from the procedure of a special verdict to a general verdict brought out an ambiguity in the burden of proof that remained camouflaged for a long time. Thus, although the procedure had changed, the common law cases continued to require the accused satisfactorily to prove self-defence, duress, insanity and provocation.

32. But this burden of proof was finally looked at afresh by the House of Lords in the famous case of Woolmington in 1935. The House of Lords held that the one golden thread throughout the web of English criminal law is the duty of the prosecution to prove the accused's guilt beyond a reasonable doubt, and therefore, the burden of proof for "exculpating" factors such as accident, provocation, and self-defence must clearly remain on the prosecution.

33. When the burden of proof was placed on the defendant in M'Naghten's case, the judges were treating insanity in the same manner as all other excusing defences at that time. They were creating neither a special not an exceptional rule for insanity. But when the House of Lords, in Woolmington, finally reversed the trend of putting the burden of proof on the accused to establish defences, they mistakenly concluded, without any analysis, that M'Naghten's case was a special and exceptional rule and, therefore, the burden of establishing the defence remained upon the accused. That conclusion was wrong and hence the rule for insanity cases is now anomalous.

34. In Canada, the burden of proof in the M'Naghten Rules was codified in 1892, long before the House of Lords decision in Woolmington. Thus the anomaly is codified in Canada. But one thing is clear; examination of the history of the rule lends no support for the claim that the rule was founded on reason, logic or policy. Instead, it was based on an historic confusion and ambiguity.

C. Illogical and Unfair

35. It is illogical that the accused has to prove mental disorder on a balance of probabilities, yet need only raise a reasonable doubt in regard to other defences such as automatism, no *mens rea*, intoxication or duress. This is a failure to take the presumption of innocence seriously. If an accused only raises a reasonable doubt as to whether or not he/she was mentally disordered (or even a 50-50 doubt); then the accused has failed to prove the mental disorder defence and will be found guilty. This is not the case with other defences. Rupert Cross, an imminent English scholar, forcefully argues that the burden on the accused to prove insanity is both anomalous and

without justification. He says that the effect of this rule is to create a presumption of guilt and that there must be something very sinister afoot before any legislature can be justified in doing that.

36. In addition to treating the mentally disordered accused unfairly in comparison to other defences, it is unfair to place the burden of proof on the accused rather than the Crown since the Crown normally has far greater resources to prove the issue than does the accused.

D. Policy Arguments

37. Pragmatic considerations are often raised as a justification for placing the burden of proof of the mental disorder defence upon the accused:

(i) to reduce the likelihood of successful fabrication of the mental disorder defence;

(ii) a reasonable doubt about the accused's mental disorder can be created too easily;

(iii) proving the accused's absence of mental disorder beyond a reasonable doubt is impossible.

38. Upon closer examination, these pragmatic considerations lack validity. The experience in the United States is particularly revealing. As of 1982, in half of the States and in all federal courts, once there is some evidence of insanity, the prosecution has the burden of proving the accused's sanity beyond a reasonable doubt. Does that burden allow a throng of fabricated insanity pleas to succeed? Does it put an intolerable or impossible burden on the Crown? I sampled the reported cases in those jurisdictions for the year 1982. In almost all of the cases there was at least some expert evidence supporting the accused's insanity plea. But in twenty-eight of the thirty cases, the defence of insanity failed. The Crown proved its case; the

accused failed to raise a reasonable doubt. If anything, these figures suggest that even raising a reasonable doubt about insanity may be too difficult a standard to meet rather than one which is too facile. (Incidentally, in jurisdictions where the accused had the burden of proof on a balance of probabilities, the accused's insanity plea failed sixteen times in seventeen cases.)

39. In Chaulk, Lamer, C.J.C. stated that "section 16(4) is a purely evidentiary section whose objective is to relieve the prosecution of the tremendous difficulty of proving an accused's sanity in order to secure a conviction" (p. 218). Lamer, C.J.C. then concluded that this objective – avoiding a near impossible burden of proof on the Crown – justifies the reverse onus as a reasonable limit under section one of the Charter.

With respect, this claim of an impossible burden is based on no evidence and is contrary to the experience of other jurisdictions. It may be difficult (or near impossible) to prove that anyone is totally sane in the widest sense of that word, but it is not unduly difficult to prove that an accused had sufficient mental functioning to appreciate the nature or consequences of what he or she did, and to know that it was wrong. Likewise Professor Healy of McGill and Professor Stuart of Queen's are both highly critical of Lamer, C.J.C.'s reasoning and conclusion on this point. (See Healy at 2 C.R. (4th) at 105-106 and Stuart at 2 C.R. (4th) at 113-117.) And in dissent, Wilson, J. rebuts Lamer, C.J.C.'s concern that lowering the standard of proof in the insanity defence would make it very easy for an accused person to "fake" the insanity defence. She refers (at C.C.C. 250) to studies in the United States (where the burden of proof is lower) which reveal that fabricated insanity pleas are not a problem.

40. The English Criminal Law Revision Committee in their Eleventh Report (1972) and Fourteenth Report (1980) recommend that the burden of proof be changed so that the accused need only raise a reasonable doubt to establish the insanity verdict. The federal government, in its 1984 Report, recommended retention of the current rule.

IV. DIMINISHED RESPONSIBILITY

41. In paragraph 8, I indicated that I favoured a system of diminished responsibility in addition to the mental disorder defence. This was considered by the Department of Justice in the process of its consultations. However in its 1984 Report, it concluded (p. 29):

> It is recommended that although ultimate adoption of the concept (of diminished responsibility) is a worthwhile goal, additional research and consultation should be conducted prior to formally adopting broad-based diminished responsibility provisions for the Criminal Code.

42. I am unaware of any additional research or consultation by the Department of Justice on this point. If this Parliamentary Committee believes, as I do, that diminished responsibility should be included in the Criminal Code, then the appropriate model in my opinion, is set out in the Department of Justice's 1984 Report. This model would <u>supplement</u> the insanity test as follows:

(1) Everyone is <u>partially</u> excused from criminal responsibility for his/her conduct if, as a result of mental disorder, that person lacked <u>substantial</u> capacity to appreciate the nature, consequences or

wrongfulness of such conduct or to conform to the requirements of the law.

(2) Everyone partially excused under subsection (1) of this section shall be convicted of the offence in a diminished degree [or in the second degree] and shall be subject to the same range of punishments as is applicable in respect of persons who are convicted of an attempt to commit the offence.

43. In its 1984 Report, the Department of Justice stated:

> "There was a very general discussion during our consultations on the issue of diminished responsibility. There was some support that this principle be articulated in the Code.... The proposal would result in a reduction in the level of degree of offence. This form of diminished responsibility does not exist in the United States and only exists in England with regard to murder (reduced to manslaughter) and in Canada with regard to murder (reduced to infanticide pursuant to s. 216 of the Criminal Code, or to manslaughter by reason of provocation pursuant to s. 215). It has been suggested that a combination of the options available in England of diminished responsibility and hospital orders has resulted in the insanity defence being raised in relatively few cases in recent years.
>
> Some of those who indicated support for this concept suggested that it should only apply to major offences as is the case in Great Britain. Others queried how diminished responsibility might operate in relation to the matter of *mens rea*.
>
> There was some concern that because the British system (and society) is so different from ours, there would be great danger in

adopting their diminished responsibility concept as is. In addition, although the Code makes some provision as noted above, the concept has not been generally formalized in this jurisdiction and may therefore create considerable problems should it be adopted without further study and consultation.

The majority of whom we consulted who commented on this matter were of the opinion that much more work is required in terms of both research and consultation before the concept of "diminished responsibility" can be formalized as part of the Criminal Code."

44. I would add the following comments on the above diminished responsibility defence:

(i) This proposal is drafted in a manner to be consistent with the criteria in the mental disorder test. Since the criteria in the mental disorder test are wide – i.e., mental disorder has a wide definition, cognitive and volitional impairment are recognized, moral or legal wrongfulness are included – the same criteria should prove ample for a diminished responsibility test.

(ii) It should be noted that this test as presently drafted excludes cultural, social or political disadvantage or impairment (i.e. the "ghetto kid defence") unless such factors constitute "mental disorder".

Whether diminished responsibility should be extended beyond "mental disorder" is a separate policy issue.

(iii) In Germany, diminished responsibility applies to all offences but it operates statutorily only to reduce the punishment, not the level or degree of the offence.

(iv) It should also be noted that the English and German concepts of diminished responsibility use the word "substantial" impairment.

45. Advantages

(i) This proposal recognizes that the line between sanity and insanity is not black and white, that there are degrees of responsibility due to different degrees of mental disorder.

(ii) It recognizes partial responsibility not only by reducing the sentence but also by reducing the offence. The latter point is significant since the name attributed to an offence inherently indicates the seriousness and/or culpability of the person convicted – e.g., murder vs manslaughter, rape vs. diminished rape [or rape in the first degree vs rape in the second degree].

V. IMPOSING THE INSANITY DEFENCE ON AN UNWILLING ACCUSED

46. The British practice has always been, and continues to be that only the accused can raise the insanity defence: R. v. Smith (1910), C.A.R. 19. This can occur in one of two ways: (i) either the accused specifically raises the insanity defence or (ii) if the accused puts his or her mental state in issue, for example, by arguing automatism or no mens rea, then the prosecutor may call evidence of insanity to rebut those defences.

47. That also appeared to be the Canadian practice until 1977 when Martin, J.A. altered that position in Simpson (1977), 35 C.C.C. (3d) 337, and subsequently applied in Saxell (1980), 59 C.C.C. (2d) 176 (O.C.A.). These cases gave the trial judge a discretion to allow the Crown to raise the insanity defence against the accused's wishes.

48. The Simpson/Saxell rule was abolished and a new rule put in its place by the Supreme Court of Canada in Swain (1991), 63 C.C.C. (3d) 481. The majority, per Lamer, C.J.C., held that the common law rule which allowed the Crown to raise evidence of insanity during the trial over and above the accused's wishes was a denial of liberty which was not in accordance with the principles of fundamental justice and not saved by s. 1 of the Charter. The majority judgment took the view that the decision whether or not to raise the issue of insanity was part and parcel of the conduct of an accused's overall defence.

49. In Swain the Court recognized that the Simpson/Saxell common law rule had two objectives:

(i) ...to avoid the conviction of an accused who may not be responsible on account of insanity, but who refuses to adduce cogent evidence that he was insane, and

(ii) ...the protection of the public from presently dangerous persons requiring hospitalization.

50. The Supreme Court devised a new rule to achieve these two objectives:

(i) the insanity defence may be raised during the trial by the accused; or

(ii) during the trial by the prosecutor if in the trial judge's opinion the accused has somehow put his or her mental capacity for criminal intent in issue; or

(iii) by either the accused or the Crown after the trier of fact has concluded that the accused was guilty of the offence, but before a verdict of guilty is formally entered.

51. Point (iii) in the above rule creates what has been called divided or bifurcated trials. They have been a failure in California and elsewhere. It is difficult,

often impossible, to separate evidence of mental disorder, from proof of actus reus and mens rea.

52. I recommend abolition of point (iii) above and codification of points (i) and (ii), which would return us to the original common law position, the position in England, and the position in a majority of United States jurisdictions. On this point, I disagree with the CBA Task Force which recommends the position set out in Swain, which includes point (iii) above.

53. My recommendation is based on the assumption that the accused, with the advice of counsel, is competent to decide whether or not to raise the mental disorder defence. That decision should be respected for the following reasons:

(i) a trend toward giving greater respect to individual rights, including the right of the accused to the choice of his or her own defence;

(ii) a recognition that, if the accused "must bear the ultimate consequences of any decision" whether or not to raise the mental disorder defence, he or she should have the right to make that decision;

(iii) the view that the accused's reasons for a voluntary and intelligent decision not to raise the mental disorder defence outweigh some abstract principle of justice; and

(iv) the view that imposing the mental disorder defence will do more harm and less justice than not imposing it.

54. In my opinion, the law should be amended to ensure that the prosecutor, judge or defence counsel is not entitled to impose the mental disorder

defence on an unwilling accused who has made a voluntary and intelligent decision not to rely upon it, subject to the following qualifications:

(i) If an accused who refuses to rely on the mental disorder defence is found incompetent to make an intelligent decision on the issue, he should be remanded to await trial if there is a reasonable chance that he will become competent to make the decision in the reasonably foreseeable future.

(ii) If an accused is not competent, nor likely to be competent in the near future, to make the decision, the court should make the decision for him using the "substituted judgement" standard. In other words, if the accused were competent, what decision would the accused make. If there is no factual basis for making a substituted judgement, the court should make the decision which it believes a reasonable person would make in a similar situation.

VI. CAPPING

55. I strongly agree with the Canadian Bar Association Submission on Bill C-30, Recommendation #20 that the capping provisions in s. 672.64 should be amended. The CBA recommendation should be expanded to also include caps on persons found unfit to stand trial. The revised recommendation would read as follows:

> That section 672.64 be amended to provide that where a person is found unfit or not criminally responsible on account of mental disorder, the cap should be no longer than the sentence which the court would in all likelihood have imposed under all the circumstances if the accused had been convicted of the offence and found to have been mentally disordered, but

to a degree short of exemption from criminal responsibility under s. 16.

VII. HOSPITAL ORDERS

56. The hospital order provisions in sections 736.11 to 736.14 are woefully inadequate due to their limited application:

(i) under s. 736.11, hospital orders are only available for offenders who are suffering from an acute mental disorder and immediate treatment is urgently required either

(a) to prevent further significant deterioration of the mental or physical health of the offender, or

(b) to prevent the offender from causing serious bodily harm to any person;

Comment: These provisions ignore the plight of sub-acute mentally disordered offenders, chronic schizophrenics who are not currently acute, and mentally retarded persons and many other persons suffering from mental disorders;

(ii) under s. 736.11(2), even those few acutely ill offenders who qualify for a hospital order are being told legislatively that they have 60 days to recover and no more; its back to prison after 60 days, whether recovered or not; and

(iii) under 736.14(a) acutely ill offenders who have been convicted of murder or found to be a dangerous offender under s. 753 do not qualify for a hospital order, even if there is a secure treatment facility available.

Comment: This feeble excuse for a hospital order system is the result of federal-provincial authorities failing to agree on jurisdiction, facilities and money. It is a federal/provincial disgrace. What is needed is a full and comprehensive system of hospital orders as recommended by the Law Reform Commission of Canada in 1976. This Committee should recommend that immediate action be taken on this.

To add insult to injury, the provinces have prevailed on the federal authorities not to proclaim these limited hospital order provisions for at least two or three years.

VIII. AUTOMATISM

57. I agree with the CBA Task Force's recommendation for the defence of automatism (s. 7(1) to (5), at p. 19-20). However I would add two additional subsections in order to provide a special verdict and special disposition for acquittals due to automatism. Consideration of this type of recommendation has recently been suggested by the Supreme Court of Canada in Parks (the sleepwalking case). For example, McLachlin, J. stated that "the possibility of supervisory orders in this situation may be a matter which Parliament would wish to consider in the near future".

58. I recommend the following additions to s. 7 of the CBA Task Force proposal:

Special Verdict (6) Where evidence of automatism is given at trial and the accused is acquitted, the judge or jury shall declare whether the accused was acquitted by reason of automatism.

Special Disposition (7) Where a person is found not responsible by reason of automatism, the court may deal with that person in the same manner as if that person had been found not guilty by reason of mental disorder, provided that the person's automatism is likely to occur again in a manner which poses a substantial danger to the lives or safety of others; and such persons shall be subject to the same safeguards, procedures and reviews as persons who are found not guilty due to mental disorder.

Comments:

59. The creation of a special verdict of not responsible due to automatism and special dispositions where the automatism is likely to occur again and the person poses a substantial danger to the lives or safety of others are both modelled on the mental disorder defence.

60. The requirement that the judge or jury shall declare whether the accused is acquitted by reason of automatism has the effect of creating a special verdict of not responsible due to automatism. In this respect, it is similar to the special verdict for the mental disorder defence and is justified for the same reasons that the special mental disorder verdict exists.

61. To the extent that special detention provisions are warranted in the case of persons acquitted by reason of mental disorder, similar provisions for detention of persons acquitted by reason of automatism are warranted where those persons continue to represent a danger to the public.

62. At the moment, subsection (7) simply suggests that those very few persons who are acquitted by reason of automatism and continue to be a danger to society, should be treated in a similar fashion to persons who are acquitted by reason of mental disorder and continue to be a danger to society. The Sub-Committee should consider, in more detail than I have, whether the approach suggested in subsection (7) is adequate to deal with the above mentioned cases of automatism.