Criminal Law Review

MENTAL DISORDER PROJECT

Discussion Paper

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TABLE OF CONTENTS

Chapter 1

INTRODUCTION

INTRODUCTION

The law's treatment of so-called mentally disordered offenders has been receiving increasing attention by the courts, mental health associations, law reform commissions, and many other groups and individuals over the last decade. The Criminal Code provisions in this area are fraught with ambiguities, inconsistencies, omissions, arbitrariness, and often a general lack of clarity, guidance or direction. In this paper, it is hoped to identify areas of particular concern and to present options that may assist in the development of a consistent approach to this complex area. Unlike many other areas of criminal law, those involving mental disorder seem inextricably bound up with other disciplines, such as medicine, psychiatry, psychology, social work and hospital administration.

The first area that will be examined deals with remands for psychiatric assessment. Often, the first occasion on which those involved in the administration of the criminal justice system become aware that an individual who is suspected of having committed an offence may be mentally disordered occurs during the arrest process. Most provincial mental health statutes provide a mechanism to permit police officers to take such an apparently mentally disordered individual directly to a psychiatric facility for assessment. In many cases, however, such an individual is arrested and taken to jail, and it only becomes apparent there that the individual may be mentally disordered.

Currently, the Criminal Code contains an elaborate mechanism through which courts are empowered to order that an individual attend or be remanded in custody "for observation." The operation of such provisions, however, is complex. Missing from the Criminal Code is a mechanism to take a mentally disordered prisoner directly to an appropriate psychiatric facility for assessment and possibly for treatment (perhaps even prior to that individual's appearance in court) under circumstances that may not satisfy the criteria necessary for a formal remand order. During the remand process, it is unclear what is expected of hospital staff. Are they to administer treatment to render an apparently unfit person fit to stand trial? Are they to merely "observe" the individual and to prepare a report? Who can see the report? Are they to comment on an appropriate disposition where the individual is found unfit to stand trial? May they provide an opinion as to the mental state of the individual at the time of the offence? Even where the individual may be

fit to stand trial, may they comment on needed treatment following conviction? What role does the consent of the accused play in this process? These are some of the issues that will be explored in the "Psychiatric Remands" part of this paper.

The second part of the paper will examine the matter of "Fitness to Stand Trial." It is usually assumed that the determination of fitness is the primary intent of the remand provisions of the Code. What does fitness mean in this context? What should the criteria be for assessing fitness? What kind of evidence of presumed or apparent unfitness must exist before a trial on the issue of fitness may be ordered? Who must bear the burden of proof? According to what standard?

One of the most severe criticisms of the current fitness provisions concerns the fact that an accused person may be found unfit and subjected to the possibility of indefinite confinement without the Crown having made out a prima facie case of guilt. The potential for unfairness is of greatest concern when such accused person suffers from a chronic condition, such as mental retardation, that is likely to render him or her permanently unfit to stand trial.

The third section of the paper will examine "The Defence of Insanity." Although there has been a great amount of jurisprudence on this subject, particularly over the last 15 years, there is still considerable debate as to what the most logical, moral and socially acceptable formulation might be. A number of models have been proposed by law reform commissions, and others are available by example in other jurisdictions. Some of the more important ones will be examined in this paper. Whatever definition of insanity is ultimately adopted, the operation of the defence will involve a number of thorny procedural and evidentiary questions.

The fourth section of the paper deals with "Automatism and Criminal Responsibility." A basic question considered in this part is whether automatism should be a separate defence in criminal law and, if so, how the defence should be formulated. The relationship between automatism and the defences of insanity and intoxication will also be considered, as will such questions as burden of proof and disposition.

The largest single part of the paper deals with the "Disposition and Continuing Review" of persons found unfit to stand trial or not guilty by reason of insanity. Currently, when a person is found unfit to stand trial or not guilty of an indictable offence on

account of insanity, the court must order custody pending an initial disposition by a lieutenant governor, regardless of the nature of the offence or the dangerousness of the individual. There is currently no opportunity for a hearing to determine the appropriateness of this order. While the lieutenant governor of a province has three options available with regard to the type of disposition that is made, in most instances, it is ordered that such person be kept in safe custody, rather than be discharged either conditionally or absolutely. There is currently no opportunity for the accused to make any representations to the lieutenant governor and no procedure that must be followed by the lieutenant governor in reaching a decision. It is often the case that the actual decision is delegated to an administrative officer within the government, who may act with very little input as to the most appropriate disposition for the individual.

Under the Criminal Code, review of persons detained pursuant to orders of provincial lieutenant governors is left to the discretion of the provinces. The province may establish a multi-disciplinary board that, once established, must conduct an annual review and advise the lieutenant governor of its recommendations. The lieutenant governor is not obliged to even consider, let alone follow, these recommendations. No procedures are established in the Code for these boards to guide them in the conduct of their reviews. In fact, there are great disparities in the procedures adopted by the different provincial boards.

Only the lieutenant governor of a province can ultimately permit such an individual to enter the community and eventually vacate his or her warrant. Such an individual may, therefore, be subject to indeterminate or indefinite confinement "at the pleasure of the lieutenant governor."

Another area that will be examined in this paper is that of "Interprovincial Transfers" of persons who are subject to detention under a warrant of the lieutenant governor. It is currently not clear to what extent the views of the receiving province, as distinct from the receiving facility, must be sought prior to the transfer occurring. In addition, the Code does not indicate which province and which board of review and lieutenant governor has continuing jurisdiction over the individual once he or she has been transferred. While the current basis for transfer is the rehabilitation of the individual, there is no scope for that individual to consent to the transfer; nor is it clear whether the receiving province may unilaterally

release the individual as part of the rehabilitation process, without the permission of the sending province.

The current mechanism for interprovincial transfer (based on informal interprovincial agreement) requires that a special warrant be signed by an officer authorized for that purpose by the lieutenant governor of the sending province, such warrant being necessary to effectuate the transfer. This Code provision suggests that the lieutenant governor himself/herself may not have sufficient authority by his or her own order or warrant to provide for the transfer and to authorize the detention of the transferred individual in the receiving province. One implication of this interpretation would be that an individual who is subject to a "safely keep" warrant of the lieutenant governor of a province and who escapes from that province cannot be arrested in another province because the warrant of the lieutenant governor is only effective in the province where it originated. The potentially disastrous consequences of such an interpretation are obvious. It has been suggested that this is one ambiguity that should be clarified.

Another part of this paper will examine the matter of "The Convicted Mentally Disordered Offender." Currently, s.546 of the Criminal Code permits the lieutenant governor of a province to order that a mentally disordered prisoner in a provincial prison "be removed to a place of safekeeping...." That order may survive the termination of the prisoner's sentence. One difficulty that flows from the restriction of this provision to persons serving sentences in provincial prisons is of particular concern. On occasion, persons who may be mentally disordered and dangerous are released on mandatory supervision from federal penitentiaries. Although in some circumstances provincial civil commitment statutes may be of assistance, there may be some utility in examining the principle behind s.546 and the appropriateness of extending it to mentally disordered prisoners in federal penitentiaries. In this regard, it may also be useful to review the scope of s.19 of the Penitentiaries Act.

One area that is briefly considered in this part of the paper involves the possibility of permitting so-called "hospital orders" for convicted offenders. While this subject may be more appropriately dealt with as part of the sentencing paper, it was decided to consider it under the topic of mental disorder because it does involve a direct disposition to a psychiatric facility where the specific criteria are satisfied. Hospital

orders are employed in Great Britain. Indeed, there is some evidence to indicate that because of the hospital order option (and possibly also because of the defence of diminished responsibility) very few persons are currently found insane or unfit to stand trial in Britain. Nevertheless, the Law Reform Commission of Canada's recommendation for the adoption of a similar system has not been received very well here. Briefly, this option would extend the range of alternatives available to a trial judge following conviction. For an individual whose current mental disorder was not sufficiently serious to prohibit him or her from effectively participating in the trial process, or to give rise to a successful defence of insanity, there may be cases where a hospital order would be more appropriate than a prison sentence. For example, where evidence demonstrates that the offender would likely benefit from treatment in a psychiatric facility and might significantly deteriorate if sent to prison (and where probation would not be appropriate), it may be argued that the court should have the option of sentencing him or her to a term in an appropriate psychiatric hospital that is willing to receive him or her. The issues and options relating to this subject are reviewed in this paper.

The final matter that is considered in the paper deals with "The Mentally Disordered Young Offender." Insane or unfit young people who commit "criminal" acts have generally been dealt with in a similar fashion to adults. While the number of young persons placed on warrants of the lieutenant governor is relatively small, there are many who feel that greater protections and provisions, tailored to the special needs of young people, should be developed for mentally disordered young offenders. It has been argued that as the thrust and underlying philosophy of the Young Offenders Act is different from that of the Criminal Code, there should, therefore, be special provisions designed for inclusion in the Young Offenders Act that would apply to mentally disordered young offenders.

The Appendix contains a Bibliography of cases, articles, books and reports referred to in the text; a summary of an American study; and the States of Oregon review board legislation.

A guiding force for the Criminal Law Review is the Government of Canada publication, The Criminal Law in Canadian Society (CLCS). While the Law Reform Commission of Canada's 1976 Report to Parliament on Mental Disorder in the Criminal Process is a most helpful guide in directing appropriate alternatives for consideration in this area (and is relied on in a

number of important parts of this paper), the CLCS document establishes a blueprint from which much of the philosophy behind the discussion in this paper flows. Therefore, it may be useful at the outset to review some of its guiding principles in relation to the foregoing areas of discussion.

One of the most important considerations in the development of this paper has been the impact of the Canadian Charter of Rights and Freedoms. As the CLCS document points out on p.31:

> "[I]mplementation of the principles and rights enshrined in the Canadian Charter of Rights and Freedoms is of special importance. Certain aspects of the law may require amendment to comply with the Charter, and examination of both substantive and procedural components of the existing law has already begun. In addition, it will be a continuing duty to scrutinize proposals for changes to the law in order to ensure compliance with the Charter."

Of particular significance to the mental disorder area of the criminal law are those provisions of the Charter dealing with fundamental justice (s.7), arbitrary detention (s.9), cruel and unusual treatment (s.12), and equality before the law (s.15(1)).

One of the recurring themes of the CLCS document is that the least restrictive form of intervention necessitated in the circumstances should be used, and that one must always be mindful of the doctrine of restraint (pp.4, 5, 6, 29, 48, 49, 50, 51, 53, and 64). The principle of using the least intrusive or restrictive mechanism necessary in the circumstances is of particular importance when one considers the matter of the disposition of persons found not guilty by reason of insanity or unfit to stand trial. For example, this principle may necessitate that the Code require the presentation of evidence before an impartial trier of fact, with full substantive and procedural protections, to the effect that an individual found insane is both mentally disordered and dangerous to others, before an order for confinement can be made on initial disposition. This principle may be reflected procedurally by requiring that the prosecution retain the burden of proving, beyond a reasonable doubt, that there is a need for the initial confinement of such an individual. However, the CLCS document suggests

(at p.61), that this "does not preclude exceptional instances where the onus of proof is shifted from the prosecution to the defence." Thus, where persons found insane or unfit have been proven to be mentally disordered and dangerous (and, therefore, in need of confinement) it may be appropriate to consider shifting the onus of proof to the individual at the review stage to establish that he or she is no longer dangerous to society. To leave such a burden on the prosecution or on the institution holding the individual at the review stage may be inappropriate; the task of establishing the continuing dangerousness of a person whose confinement may have been the major factor in preventing dangerous behaviour might be a difficult one.

The CLCS document discusses at length the need for an appropriate balance (pp.49, 50, 51) "between individual liberties and the provision of adequate powers for the state to allow for effective crime prevention and control...." There is reference to the British Royal Commission on Criminal Procedure's recognition of the increasing popularity of the concept of the need to balance the rights of individuals with the security of society, and the statement that the means of achieving this balance can often best be gained through the use of "a presumption, onus, or burden of proof that must be discharged by reference to facts and experience." This principle is explored in a number of parts of this paper.

There is a recurring reference through the CLCS document to the need for procedural safeguards to ensure that individual rights are protected against unwarranted intrusion by the state. This concept is of particular importance in relation to the review mechanism that is used to consider the continuing appropriateness of initial disposition orders by lieutenant governors. The current Code provisions and some provincial mechanisms established to deal with the review process have been criticized because of their perceived inherent unfairness. It may now be appropriate to consider developing a more formalized mechanism that includes certain fundamental rights, such as a right to a hearing, a right to counsel, a right to call and to cross-examine witnesses, and a right to an effective appeal. Indeed, the very question of the appropriateness of continuing the role of provincial lieutenant governors in the process should be considered in light of the guiding principles in the CLCS document.

While it may be argued that there is no need to define all of the above rights in the Code, one must be mindful of an important guiding principle of the CLCS document that "where 'liberty' is at risk, statutory definition of one's rights is fundamental and necessary" (p.61).

Additional support for an inclusion of procedural protections may be found in the CLCS document's reference to such important existing principles as "the right to a fair hearing before an independent and impartial adjudicator...." (p.48). It may be that the current mechanism whereby lieutenant governors reach decisions on disposition and review does not satisfy this concept.

The CLCS document stresses the "right to appeal" as a crucial means of ensuring legal accountability. In addition to the possible need to mandate procedural safeguards for persons found insane or unfit who are subject to confinement orders, therefore, there is the issue of whether a special appeal mechanism should be established (p.32).

Another important theme throughout the CLCS document is its reference to a recommendation of the Law Reform Commission of Canada that the principle of responsibility must remain the cornerstone of the imposition of criminal sanctions (p.47). The CLCS document refers to the need to clear up confusion about insanity and to clarify the concept of responsibility, which in many ways is one of the most important principles of our criminal justice system for it determines the state of mind that is necessary for an individual to be held culpable for his or her acts. Both the need to clarify the notion of "responsibility" and the principle that the criminal law must provide clarity and precision as to which persons are to be caught by its sanctions make it particularly important that the Code amendments remove any ambiguities currently found in s.16 and set forth language that hopefully will need little judicial interpretation.

One of the purposes of the criminal law expressed in the CLCS document is that sanctions for criminal conduct should be related to the degree of responsibility of the offender (p.53). Consideration is, therefore given, in the "Insanity" part of this paper, to the possibility of including a defence of diminished responsibility in the Criminal Code.

The CLCS document establishes as another guiding principle the notion that persons found guilty of similar offences should receive similar sentences,

where the relevant circumstances are similar (p.53). Consistent with this principle and with s.15(1) of the Charter of Rights is the notion that the principles involved in making decisions regarding the disposition of persons found not guilty by reason of insanity or unfit to stand trial should be consistently applied in all areas of the country. To the extent that the exercise of discretion by lieutenant governors in similar cases varies greatly, both the consistency and equality principles may be offended.

Another guiding principle is that "the criminal law should ...clearly and accessibly set forth the rights of persons whose liberty is put directly at risk through the criminal law process..." (p.53). To the extent that many of the current Code provisions (and omissions) in the area of the disposition and review of persons found not guilty by reason of insanity or unfit to stand trial are unclear and ambiguous, this principle may also be offended.

Alternatives aimed at satisfying these principles are set out in this paper.

The equality concept is again emphasized by another CLCS principle that "in order to ensure equality of treatment and accountabilty, discretion at critical points of the criminal justice process should be governed by appropriate controls..." (p.54). Current Code omissions and vague provisions may be inconsistent with this principle in a number of areas. For example, provincial lieutenant governors currently have a virtually unfettered discretion regarding the disposition and review of persons found not guilty of indictable offences by reason of insanity or unfit to stand trial. Some boards of review follow a "paternalistic" review model, within which the rights of the individual may not be fully respected. In some cases, lieutenant governors disregard the advice of their boards of review to permit a greater degree of freedom and make decisions on political and other grounds which may be unconnected to the rehabilitative needs of the individual and that individual's current dangerousness. The provisions of the Code that guide the actions of the lieutenant governor refer to "the best interest of the accused..." and "the interest of the public..." The provisions that guide the board of review (where one is established) refer inter alia to the question of whether the person "has recovered..." and "the interest of the public and of that person...." These terms are so vague and imprecise as to permit

arbitrariness in the decision-making process. The "Disposition and Continuing Review" part of this paper, therefore, considers alternatives that might come closer to satisfying the principle of "appropriate controls" proposed in the CLCS document.

There is mention in the CLCS document of the importance of meeting our obligations under international covenants and agreements (p.56). It may be particularly useful to examine decisions of the European Court of Human Rights in some of the areas discussed in this paper, and the effect that those decisions have had on requiring amendments to similar legislation and administrative procedures in other jurisdictions (such as Great Britain).

There is reference in the last paragraph of the CLCS document to "the attitudes and behaviour of individual citizens...." (p.69). In the end, the legislative mechanisms that will be adopted to attempt to satisfy the guiding principles in the CLCS document (and, therefore, to achieve the necessary balance between the rights of individuals and the security of society in relation to mentally disordered persons caught up in the criminal justice system) will inevitably be influenced (and perhaps eventually determined) by public attitudes and desires. It is an old and somewhat trite adage that justice must not only be done but must be seen to be done. To the extent that the current system is fraught with ambiguities and uncertainties in an area so vital to the rights and freedoms of the individual, it is particularly important that a range of alternatives be presented and debated as fully as possible. Hopefully, these alternatives will serve as a framework for developing a complete package of legislative reforms in the important and sensitive area of mental disorder and criminal justice.

In the interest of making this paper understandable to non-lawyers, an attempt has been made to keep legal terminology and citations to a minimum. Those wishing a copy of legal materials prepared as part of the research for this paper should write to the Project Office at the following address:

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Chapter 2

PSYCHIATRIC REMANDS

PSYCHIATRIC REMANDS

INTRODUCTION

The mental state of an accused person may be relevant to various issues that may arise in the course of a criminal trial. The Criminal Code currently contains several near-identical provisions which authorize the "observation" of persons thought to be suffering from mental disorder, such observation orders being colloquially referred to as "psychiatric remands."

Questions concerning the purposes and grounds for remand, the duration of remands, the evidence required by the court, the place and nature of the remand, treatment of the person under remand, and so on, are issues which clearly require attention in any review of the Code.

ISSUES

Issue 1

For what purposes should "psychiatric remand" be sanctioned?

Discussion

One clear purpose of the observation provisions in ss. 465 and 738 is the gathering of information concerning the accused's mental condition relevant to the question of whether an issue should be tried as to his or her fitness to conduct a defence at a preliminary inquiry or to stand trial, respectively. Such purpose, though likely, is less clear in the Code's main provision relating to fitness to stand trial, s. 543.

Although not expressly articulated, one probable purpose of the observation provisions contained in ss. 465, 543 and 738 is that of providing potential expert psychiatric witnesses with a basis upon which to give expert testimony on the fitness issue itself.

Another possible purpose suggested by the observation provisions in ss. 465, 543 and 608.2 is the gathering of evidence relevant to the offence (or defence) of infanticide.

It appears from at least one reported case that the purpose of the observation provision in s. 608.2 is the gathering of psychiatric information relevant to the issue of whether the appellant was insane at the time of the offence.

Because s. 543(2) of the Code may be used "at any time before verdict or sentence ..." (emphasis added) one purpose of that provision would appear to be the gathering of psychiatric evidence which may be relevant to the question of sentence. The express purpose of s. 691 of the Code is that of obtaining evidence relevant to the question of whether an offender is a dangerous offender within the meaning of s. 688 and should be sentenced to detention in a penitentiary for an indeterminate period.

In practice, the Code's observation provisions may also be used to obtain information relevant to the issue of civil commitment. (It is doubtful, however, that this use could in any way be considered a "purpose" (however oblique) of any of the Code's provisions).

To sum up, the Criminal Code is not explicit about the purposes served by psychiatric remands. Although there are several possible purposes for which they may be used, there would appear to be a need for explicit authority for, and limits on the use of, psychiatric remands in criminal proceedings.

Alternative I

Provide clear statutory authority for psychiatric remands, but only for the purpose of assessing present mental condition relevant to the issue of fitness to stand trial.

Considerations

Such a provision would preserve the accused's right to a fair trial by ensuring that he or she can effectively participate in the process. By restricting remands to questions of fitness, the provision would reduce the chance that the acused might be compelled (or unfairly induced) to provide evidence against him- or herself on the issue of guilt (particularly if coupled with a "psychiatric privilege" regarding statements made to a psychiatrist in the course of a court-ordered fitness examination).

A provision of this sort might, however, deprive the accused of an easy and efficient means of gathering evidence for a possible "psychiatric defence," unless fitness is an issue. It might also preclude the prosecution from obtaining evidence relevant to an issue other than fitness, e.g., the issue of whether the accused is a "dangerous offender" for the purpose of an application under s. 688 of the Criminal Code, or the question of bail.

Alternative II

Provide clear statutory authority for psychiatric remands for the purpose of assessing the accused's mental condition in cases where it may be relevant to some or all of the following:

(a) the question of bail;

(b) the accused's fitness;

(c) the accused's mental state at the time of the alleged offence;

(d) the question of disposition;

(e) the question of whether the accused is a "dangerous offender" for the purpose of Part XXI of the Code;

(f) the accused's capacity to make an oath;

(g) the accused's credibility as a witness or deponent; or

(h) the question of whether withdrawal of charges is appropriate.

Considerations

Bail

The first contact that the accused has with the judicial system after arrest is often a bail hearing. The issue of the accused's mental state may be relevant to the question of whether bail should be granted and, if so, on what conditions. If included as a purpose for remand, it may provide an additional safeguard to the

public; if the accused is found to be seriously mentally disordered and therefore either dangerous or unlikely to appear for the next stage of the proceedings, psychiatric evidence on this point would be available to the judge before he or she makes a determination on the question of bail.

The Accused's Fitness

The advantages discussed for Alternative I would apply here.

The Accused's Mental State at the Time of the Alleged Offence

Currently, there is no provision in the Code expressly authorizing remand for the purpose of determining mental status at the time of the offence. Such determinations are, however, often made during remand on the question of fitness. This provision would permit the court to remand an accused in the absence of current mental disorder to determine whether an ongoing mental disorder was prevalent during the time the offence was committed.

Disposition

Currently, when the court makes a finding that the accused is not guilty of an indictable offence on account of insanity, or that the accused is unfit to stand trial, the judge must order the accused to be held in custody until the pleasure of the lieutenant governor is known. There is currently no formalized structure to enable the lieutenant governor to gain evidence which would assist with an appropriate disposition order. It would be useful to have the ability to remand an individual to obtain specific data regarding the most appropriate disposition where a psychiatric disorder has been identified.

Even where a conviction is registered, it may be useful to have a remand provision available to the court to enable the court to determine the most appropriate sentence to impose. This may be particularly beneficial if the recommendation of the Law Reform Commission of Canada on hospital orders is adopted (see infra).

Dangerous Offender

In the 1976-77 amendments to the Criminal Code, the Dangerous Sexual Offender provisions were combined with the Habitual Offender provisions into what are now the

Dangerous Offender provisions of the Code. Under the current provisions, s. 691 provides for remand for the purpose of obtaining evidence relevant to an application. In order for an indeterminate sentence to be substituted for the usual sentence, the accused must be found to be a Dangerous Offender at a hearing at which the evidence of two psychiatrists is required.

Accused's Capacity to Make an Oath

Insofar as mental disorder may interfere with one's capacity to make an oath, the utility of such a provision as this is obvious.

Accused's Credibility as a Witness

Evidence as to credibility may be admissible in some instances. It may therefore be considered useful to obtain a psychiatric assessment that could provide an expert view of the accused's credibility as a witness. (The accused may, for example, be suffering from delusions, be a pathological liar, and so on).

Withdrawal of Charges

In some circumstances (e.g., in the case of relatively minor offences, or where an individual is unlikely to become fit to stand trial) it may be possible that following a psychiatric assessment the Crown would agree to withdraw the charges on the condition that the individual receive treatment and/or remain under someone's control (i.e., through the use of provincial mental health statutes or otherwise).

Issue 2

When should psychiatric remands be authorized?

Discussion

The powers enumerated in s. 465(1) and (2) are exercisable only by "a justice acting under this Part...." As Part XV of the Criminal Code (in which s. 465 is located) deals exclusively with procedure on preliminary inquiry, the wording of s. 465 would appear to indicate that a justice has no power under the Code either to direct an accused to attend for observation, or to remand an accused in custody prior to the commencement of a preliminary inquiry. It is not made absolutely clear in the Code, however, when a preliminary inquiry commences for this purpose.

It is also unclear whether the power to make an observation order is available under the Code at the judicial interim release stage. While s. 457.1 allows for a three-day remand before or at any time during a "show cause" (bail) hearing, during which time either the Crown or defence counsel may arrange to have the accused examined on an informal basis, there is no provision in Part XIV dealing specifically with orders for observation. While it may be that s. 543 (2) of the Code could be used, as it empowers a "court, judge or magistrate..." to order the remand in custody or attendance of an accused for observation "at any time before verdict or sentence...," it is likely that the observation provision of s. 543 cannot be used at any earlier stage than the fitness to stand trial provision contained in that section.

Some judges, it should also be noted, see no problem in the use of s. 465 prior to judicial interim release hearings. Note, however, that there is nothing in either the Code or the case law to suggest that remands may be ordered prior to the accused's first appearance in court.

The provisions of s. 738(5) and (6) of the Code enable summary conviction courts to make observation orders "at any time before convicting a defendant or making an order against him or dismissing the information, as the case may be...."

Alternative I

Make provisions that allow for remand at all stages of the trial process.

Considerations

This would clearly allow for remand to be used prior to a bail hearing, prior to the commencement of a preliminary inquiry, etc., thereby providing for the assessment of the accused's mental condition at any time where this may be in question. Such provision would allow the accused to participate in treatment at the earliest stage possible and might provide the court with evidence germane to public safety, i.e., the accused's mental condition.

Alternative II

Provide for remands as described in Alternative I, but allow as well for remands prior to the accused's first appearance in court.

Considerations

This would allow commencement of treatment of an acutely disordered accused person (e.g., a suicidal individual) at the earliest possible time. It might also provide the best possible opportunity to discover what the mental condition of the accused might have been at the time of the offence. In light of the minimal time lag between an accused's arrest and his or her first appearance in court, however, it is questionable whether this type of provision would be necessary.

Issue 3

Under what conditions should the remand take place?

Discussion

Psychiatric examination, observation, assessment, etc. may or may not require detention of the accused person, depending on a variety of factors. At issue here is the question of whether custodial and/or non-custodial remand should be expressly provided for in the Criminal Code. The Code's current observation provisions allow alternatively for courts to "direct" the accused, defendant or offender, as the case may be, to "attend, at a place or before a person specified in the order and within a time specified therein, for observation ...."

Issue 4

Assuming that both custodial and non-custodial remands are authorized, on what basis should a choice between the two be made?

Discussion

The Criminal Law in Canadian Society, published by the Government of Canada in 1982, set out a formal statement of principles for criminal law intended to give guidance

to the Criminal Law Review. One principle to be applied in achieving the purposes of the criminal law is that, wherever possible, "preference should be given to the least restrictive alternative adequate and appropriate in the circumstances." There appears to be only one alternative consistent with this principle.

Alternative

Specify that the psychiatric remand must be non-custodial unless:

(a) the accused consents to a remand in custody;

(b) the accused is otherwise required to be detained in custody; or

(c) the court is satisfied that detention of the accused is justified.

Considerations

This makes it clear that non-custodial observation is the preferred option, and minimizes unnecessary custody. This approach is also consistent with the Code's judicial interim release (bail) provisions which also generally require the prosecutor to show cause why detention of the accused is justified. In addition, this option would go a long way toward satisfyng the requirements under ss. 7,9,11(e) and 15(1) of the Charter.

Issue 5

What provision should be made with respect to the place to which persons may be remanded?

Discussion

When directed to attend for court-ordered observation under current Criminal Code provisions, the subject may be sent to "a place or before a person specified in the order ...." When remanded in custody, the subject may be placed in "such custody as the [justice, court, judge, magistrate, etc.] directs...." Presumably, therefore, the place of observation may be anywhere from a psychiatric facility to a jail or prison.

Issue 6

Should provision be made requiring notice of an application for psychiatric remand?

Discussion

Currently, the Criminal Code makes no provision for notice of an application for psychiatric remand. Arguably, because any detention under remand is normally relatively short, the absence of notice may not be seen as unduly prejudicial to the rights of the accused. Often the issue of remand arises spontaneously, and notice may be impractical. Furthermore, a notice requirement may waste valuable time where there are compelling reasons to remand the accused as soon as possible.

It is possible, however, that the absence of a notice requirement may render the current remand provisions susceptible to attack under s. 7 of the Charter. Moreover, the possible evidentiary implications of psychiatric remand are currently serious (i.e., information obtained during remand may, in some circumstances, be introduced as admissions or confessions, or to rebut a psychiatric defence). If notice were given, the unrepresented accused could obtain legal advice on the question of whether he or she should co-operate.

Issue 7

What should be the criteria for ordering a psychiatric remand?

Discussion

The question of grounds is closely related to the purpose for which psychiatric remand may be ordered. Under current Criminal Code provisions, the purpose of remand may not always be clear from the wording of the grounds, which vary slightly depending on the section of the Code applicable.

In order for a justice acting under Part XV to make an observation order under s. 465 (1), he or she must be of the opinion that "there is reason to believe that ...the accused may be mentally ill, or...the balance of the mind of the accused may be disturbed, where the accused is a female person charged with an offence arising out

of the death of her newly-born child..." (emphasis added). Under s. 543(2), however, a court, judge or magistrate must be of the opinion that "there is reason to believe that...an accused is mentally ill, or...the balance of the mind of an accused is disturbed, where the accused is a female person charged with an offence arising out of the death of her newly-born child..." (emphasis added). Section 608.2(1) of the Code seems to have borrowed from each of the above two provisions, requiring a judge of the court of appeal to be of the opinion that "there is reason to believe that...the appellant may be mentally ill, or ... the balance of the mind of the appellant is disturbed, where the appellant is a female person charged with an offence arising out of the death of her newly-born child..." (emphasis added). Section 738(5) of the Code has adopted the format of s. 543(2)(a), requiring a summary conviction court to be of the opinion that "there is reason to believe that the defendant is mentally ill ..." (emphasis added) but has omitted the provision contained in s. 543(2)(b) for the obvious reason that infanticide is an indictable offence. Lastly, s. 691(1) of the Code (which deals with the power of a court to which an application has been made to have an offender declared a "dangerous offender" under Part XXI and sentenced accordingly) sets out a test entirely different from any in the Code's other observation order provisions. Under its terms, the court must simply be of the opinion that "there is reason to believe that evidence might be obtained as a result of such observation that would be relevant to the application."

Note that the term "mental illness" is not defined in the Criminal Code. The terms may well be narrower than the concept of "mental disorder," an expression which appears frequently in provincial mental health legislation and is defined therein. It may be, for example, that mental retardation would be embraced by the term "mental disorder" but not by the term "mental illness." Furthermore, it may be argued that the reference to the infanticide section of the Code is either superfluous or illogical. If the term "mentally ill" really means "mentally disordered," then the woman who fits within the infanticide section would no doubt fall within its meaning. If the term "mentally ill" is narrower than "mentally disordered," why make a special exception only for women potentially guilty of infanticide?

Under the present criteria, many more persons are remanded in some jurisdictions than can be adequately coped with. It may be that delays in jail resulting

from severe backlogs worsen the remanded person's mental condition. It should also be noted that under the present system many more persons are remanded than are ultimately found to be unfit. In a recent Canadian study (Webster et al.), for example, 84.7% of those persons remanded for assessment in six Canadian cities were ultimately found to be fit. In other Canadian studies, the figure ranged from 65% (Arboleda-Florez et al.) to 93% (Kunjukrishnan et al.). It is not known, however, what effect treatment or "coaching" (i.e., education or training as to the nature of the proceedings and the court process) had on these statistics.

Alternative I

Same as status quo, but:

(1) substitute the words "is mentally disordered" for "may be mentally ill" and define "mental disorder" as "any disease or disability of the mind" (Ouimet Committee recommendation); and

(2) delete the ground relating to infanticide.

Considerations

This change would help ensure that the mentally retarded could be remanded for observation under the Code. It might also permit the remand of persons with other disorders who might not be eligible under the current provisions. Under this approach the "may be"/"is" inconsistency alluded to earlier would be eliminated as well. Note, however, that broadening the category of persons eligible for remand might place an increased burden on mental health facilities; this may raise cost, safety, and other related policy issues.

Alternative II

Same as status quo or Alternative I, but specify that psychiatric remand may be ordered where a defence based on mental disorder is raised or where the prosecution is given notice that the accused intends to raise such a defence (ALI Model Penal Code, s.4.05).

Considerations

This approach may help the prosecution to cope more effectively with a "psychiatric defence" where the consequences of an accused's failure to cooperate once a psychiatric remand has been ordered (e.g., criminal penalty or adverse inference) are made clear. It may be argued, on the other hand, that this approach is unnecessary. It appears from recent rulings that an inference adverse to the defence of insanity can currently be drawn from an accused's failure to submit to examination by Crown-retained psychiatrists. Moreover, the Crown may attack a "psychiatric defence" by cross-examination of defence psychiatrists and/or by calling its own psychiatric witness(es) to testify on the basis of hypothetical questions.

Issue 8

What provision should be made with regard to consent for the purposes of psychiatric remand?

Discussion

Under the present Criminal Code provisions, there is no requirement for consent of the accused to psychiatric remand. Since all that is currently being expressly authorized is "observation" (as opposed to treatment or examination) it is arguable that consent is a non-issue. Even if examination were expressly authorized, it could be argued that because the law prohibits the conviction of persons who either are currently unfit to stand trial or were insane at the time of the offence, the person's consent should not be a factor. Both of these arguments may, however, be rebutted. The first argument may be seen as artificial; in practice, once the accused is within the control of the psychiatrist during "observation" he or she may find it extremely difficult (owing to his or her mental disorder or to subtle investigatory techniques which the psychiatrist and associated staff may employ) to prevent some form of examination from taking place. The second argument above may be equally misleading. Under the present law, information obtained as the result of psychiatric examination may have many other uses beyond that of supporting unfitness or insanity; information obtained from psychiatric examination may incriminate the accused or support a finding of guilt in many instances.

Alternative I

Prohibit all non-consensual psychiatric remands.

Considerations

This approach would preclude the inquisitorial use of psychiatric expertise as a means of gathering incriminatory evidence against accused persons. It might, however, deprive unfit persons who refuse to be examined because of their mental disorder of the right to a fair trial (see s. 2(e) of the Bill of Rights and s. 7 of the Charter). It might also prevent the Crown from gathering incriminatory evidence from the accused, or evidence to rebut a psychiatric defence, by a psychiatric examination where the accused has not consented to examination. (Currently, of course, the Crown is not supposed to do this).

Alternative II

Permit non-consensual remands for the purpose of assessing the accused's mental condition relevant to the issue of fitness, but require the accused's consent for any remand ordered for any other purpose.

Considerations

This approach would protect the accused's right not to be tried while unfit. It would prevent the Crown from gathering incriminatory evidence from the accused, or evidence to rebut a psychiatric defence, via psychiatric examination where the accused has not consented to examination and his or her fitness is not in issue.

Issue 9

What provision should be made with regard to medical or other expert evidence in support of remand?

Discussion

The question of medical or other expert evidence raises the issues of both expediency and fairness to the accused. Ideally, any requirement for expert evidence should not be so stringent as to constitute an

unworkable impediment to necessary remands. On the other hand, the consideration of fairness demands that an accused not be subjected to a loss of liberty and/or an invasion of his or her privacy without good cause.

All of the Criminal Code's observation provisions normally require "the evidence ...of at least one duly qualified medical practitioner ..." before an order can be made. As indicated by the case law, these words require the actual presence of the doctor in court in order that he or she might give oral evidence and be subject to cross-examination. In circumstances "where [the prosecutor or respondent, as the case may be] and [accused, appellant, offender or defendant, as the case may be] consent...," the medical evidence requirement may be satisfied by "the report in writing of at least one duly qualified medical practitioner...." The requirement for such evidence may be dispensed with, at least for the purpose of a remand in custody, "where compelling circumstances exist for so doing and where a medical practitioner is not readily available to examine the [accused, appellant, offender or defendant, as the case may be] and give evidence or submit a report...." It is not entirely clear, however, whether in such circumstances the requirement for the evidence or report of a duly qualified medical practitioner may be dispensed with (a) for the purpose of both a direction to attend for observation, and a remand in custody for observation or (b) only for the purposes of the latter order.

The general requirement for evidence of at least one duly qualified medical practitioner guards against unnecessary remands. Arguably, this requirement is not unduly onerous. A psychiatric opinion is not required; the opinion of any M.D. will do. Additionally, allowing for a report in writing instead of oral evidence makes the requirement flexible. Allowing for the general requirement to be dispensed with "where compelling circumstances exist for so doing and where a medical practitioner is not readily available..." also permits flexibility.

It may be argued, however, that the requirement for medical evidence is unreasonable, since the purpose of the remand is to obtain a medical/psychiatric opinion on the accused's mental condition. If this opinion were available, no remand would be necessary. Furthermore, the grounds on which medical evidence can be dispensed with may be too vague. One might question what the "compelling circumstances" are.

Alternative

Require the evidence of a psychiatrist, psychologist, social worker, psychiatric nurse, or other person qualified by the court or provincial law.

Considerations

It may be questioned why duly qualified medical practitioners are the only professionals named as persons entitled to provide the evidence necessary for remand. Expansion of the category of persons in the way suggested in this alternative would make the category less arbitrarily narrow.

It must be pointed out that if one or more of the above-named persons are required in addition to a physician, the requirement for such specialized evidence beyond that of a medical practitioner may be unduly onerous. The purpose of remand, after all, is to get such evidence. Moreover, under the current Criminal Code provisions, it could be argued that there is nothing to preclude the evidence of the qualified persons listed above from being used to show "compelling circumstances" wherein remand may be ordered without the evidence of a duly qualified medical practitioner.

Issue 10

Who should be permitted to seek the accused's remand?

Discussion

Currently there is no express provision specifying persons who may seek remand of the accused. The case law suggests, however, that the issue of remand may be sought by the accused, by the Crown, or by the Court itself. Considerations of fairness and justice to the accused may require more specificity on this question.

Alternative I

Provide that only the accused may seek remand.

Considerations

While this option would maximize protection of the accused's liberty, it may be unfair to require a pos-

sibly mentally disordered accused person to seek remand on his or her own behalf, particularly where he or she is not represented by counsel.

Alternative II

Provide that remand of the accused may be sought by the accused, by the prosecution and by the court.

Considerations

Providing that any of those identified above may seek remand of the accused would allow remand to be raised for the unrepresented accused who is too disordered to seek it him- or herself. It might, however, prevent the accused from proceeding to trial as quickly as he or she wishes.

Issue 11

What provisions should be made with regard to burden and standard of proof when the defence seeks remand?

Discussion

As was the case with the medical evidence issue above, the issue of burden and standard of proof involves consideration of both expediency and fairness to the accused. Where the accused is disordered and unrepresented by counsel, it may be unfair to require him or her to satisfy any burden. Where the defence seeks remand, fairness to the accused is, of course, not that significant a consideration. There remains, however, an interest in minimizing unnecessary remands which may delay the administration of justice. Burden and standard of proof will, in theory, govern the ease with which remand may be obtained at the request of the defence.

While the Code makes no specific provision concerning burden of proof, it may be inferred from the general requirement for medical evidence, that there is a presumption against the existence of the conditions set out in the provisions, and that the burden of rebutting this presumption rests on the party seeking the observation order. The fact that medical evidence may be dispensed with in "compelling circumstances" where a

medical practitioner is not readily available, however, raises the question of whether the court is entitled in the appropriate circumstances to make an observation order notwithstanding the fact that neither party has sought one. It may be argued, in other words, that any presumption as to the non-existence of the requisite conditions simply disappears on the appearance of "compelling circumstances," such as the accused's behaviour in court, etc. On the other hand, it may be contended that both the existence of compelling circumstances and the fact that no medical practitioner is readily available must be proved by a party seeking an observation order in the absence of medical evidence.

In practice, the prosecution or defence generally makes application for remand. Though there is little Canadian case law on point, the recent case of R. v. Deacon is worth mentioning on the subject of standard of proof. There, where the Crown had made application to have the accused remanded for observation under s. 465(1)(c) of the Code, Shupe J. stated that "As a condition precedent to ordering a thirty-day psychiatric remand, this Court must be satisfied on the balance of probabilities that the accused...may be mentally ill...." It might be questioned whether the requisite standard of proof remains the same regardless of which party seeks the remand, and whether it is affected by the alternate uses of the expressions "may be" and "is" in the Code's various observation provisions.

Alternative I

Require the applicant to prove the existence of the requisite criteria on a balance of probabilities.

Considerations

This approach would minimize unnecessary remand but would not be unduly burdensome for the defence.

Alternative II

Require the applicant to raise the possibility that the requisite criteria exist.

Considerations

This option would make it easier for the defence to obtain remand. However, it may result in unnecessary remands.

Issue 12

What provision should be made with regard to burden and standard of proof when the prosecution seeks remand?

Discussion

The considerations raised under Issue 11 apply here as well. Minimizing unfair invasion of privacy may be an additional consideration where the prosecution seeks remand. As mentioned before, however, this consideration must be balanced against expediency.

Alternative I

Require the prosecution to prove the existence of the requisite criteria beyond a reasonable doubt.

Considerations

This burden and standard would be consistent with the normal burden on the Crown in criminal cases as regards proof of guilt, and might help ensure against attack under s. 7 of the Charter. On the other hand, it may be that this standard is inconsistent with the nature of the issue involved (i.e., mental disorder, rather than guilt) and the purpose and nature of the deprivation of liberty (i.e., investigation which may ultimately benefit the accused, rather than punishment). Where the purpose of the remand is related to the issue of fitness, an unduly heavy burden of proof could impede a finding of unfitness being made in proper circumstances, and could therefore infringe the right to a fair trial.

Alternative II

Require the prosecution to prove the existence of the requisite criteria on a balance of probabilities.

Considerations

Although this standard is not consistent with the normal burden on the Crown as regards proof of criminal guilt, it is perhaps more compatible with the nature of the issue involved, and with the purpose and nature of the deprivation of liberty.

Alternative III

Require the applicant to raise the possibility that the requisite criteria exist.

Considerations

This approach would be even more inconsistent with the normal burden on the Crown as regards proof of criminal guilt than Alternative II, and could result in more unnecessary remands than occur at present. It would, however, provide maximum assurance that the mental condition of the accused would be ascertained in situations where it might be relevant.

Issue 13

What should be authorized as far as the nature of the observation/examination/assessment is concerned?

Discussion

Although ss. 465, 543, 608.2 and 738 of the Criminal Code all use the term "examine" when referring to the envisioned function of the duly qualified practitioner who is normally required to give evidence or submit a report before an order can be made, it is interesting that the order itself may only authorize "observation." No definition of this term is offered in the Code. Owing to the nature of the grounds upon which observation may be ordered, however, the term is generally taken in practice to refer to psychiatric examination, an expression that appears frequently (though again without definition) in provincial mental health legislation. Because the Code is silent on the question of exactly what method of examination is permissible, it may be inferred that (subject to any common law or statutory limitations) psychiatrists and those working in conjunction with them are prima facie authorized to use the standard techniques of their professions. This inference would seem, moreover, to be supported by the few judicial dicta there are on the point.

Alternative I

Specify that the remand is for psychiatric observation/examination/assessment.

Considerations

This approach is consistent with that taken in some provincial mental health legislation. Without more, however, this alternative in itself may be taken to authorize non-consensual examination, which some might see as an unjustified intrusion. Others, on the other hand, may feel that the alternative does not provide sufficiently clear authority to use standard investigatory techniques in the absence of the accused's consent.

Alternative II

Specify that the remand is for medical and/or psychological and/or .psychiatric observation/ examination/ assessment.

Considerations

An assessment of mental condition may entail medical and/or psychological tests in addition to a psychiatric interview. Though the whole package is often considered part of a thorough "psychiatric examination," this approach would specifically authorize such procedures for the sake of clarity.

As with the above option, this approach in itself may be taken to authorize non-consensual examination, which some again might see as an unjustified intrusion. Others, on the other hand, may again feel that the alternative does not provide sufficiently clear authority to use standard investigatory techniques in the absence of the accused's consent.

Alternative III

Same as Alternative I or II, but provide that the examination or assessment techniques may not be used without consent of the accused.

Considerations

This approach would provide the accused with safeguards similar to those available to other citizens. By placing such control in the hands of the accused, however, it may allow the purpose of remand to be frustrated.

Alternative IV

Same as Alternative I or II, but provide that mental health professionals are authorized to use the standard techniques of their profession regardless of whether the accused consents.

Considerations

Under this approach, the accused would not be provided with the same rights as any citizen, but the purpose of remand would likely not be frustrated.

Issue 14

Assuming that examination/assessment is permitted, what provision should be made with regard to the persons authorized to conduct examination/assessment of the accused on remand?

Discussion

The current provisions are silent on this point and are therefore flexible. Specifying the persons authorized to conduct the examination/assessment, however, might promote uniformity in quality of examination/assessment, and would limit the category of individuals or professionals allowed to conduct examination/assessment of the accused on remand.

Alternative I

Authorize only duly qualified psychiatrists and the support staff and related personnel (i.e., medical, psychological, etc.) they require.

Considerations

This approach would endorse psychiatric techniques as being most suitable in the diagnosis of mental disorder, and would endorse current practice, whereby the psychiatrist is often assisted by other persons such as those described above. Critics, however, have pointed to the paucity of empirical evidence affirming either the reliability or the accuracy of psychiatric diagnoses. They have also noted the fallibility and often unproven reliability or accuracy of psychological tests.

Note that psychiatrists may not be available in all jurisdictions where there are courts.

Alternative II

Same as Alternative I, but authorize duly qualified physicians (who may not be assisting psychiatrists and who are not themselves psychiatrists).

Considerations

This provision would be useful in jurisdictions where there are no psychiatrists. On the other hand, it may be argued that physicians who are not specialists in psychiatry should not be authorized to conduct examinations/assessments of accused persons on remand.

Alternative III

Same as Alternative I or Alternative II, but where the examination is for the purpose of determining fitness to stand trial, authorize any trained fitness evaluator.

Considerations

Recent studies, particularly one undertaken for the Department of Justice (Roesch et al.) indicate that evaluators who are not necessarily graduates in psychiatry or psychology may (when certain rigorous procedures are used) be as capable as psychiatrists or psychologists in making reliable assessments on the narrow question of fitness. Allowing fitness evaluators (other than psychiatrists or psychologists) to participate in this process is one way of increasing assessment services as well as making more efficient use of scarce forensic psychiatric resources.

There might be some resistance, however, to the introduction of a new form of expert into the courtroom. The accused might also prefer to have his or her fitness assessed only by a psychiatrist. The use of fitness evaluators will require consideration of issues dealing with training, certification, resources allocation and overall manpower planning.

Issue 15

Assuming that examination is permitted, what provision should be made with regard to the actual procedures that may be used?

Discussion

Here we are concerned with the regulation of diagnostic and/or assessment procedures. Such regulation may be necessary to protect accused persons from unwarranted exposure to intrusive, dangerous or unreliable procedures. For example, procedures such as narcoanalysis and hypnosis may be unfair to the accused for reasons to be discussed below. Regulation may also be necessary to ensure uniformity with respect to use of such procedures.

The Criminal Code makes no provision with regard to the procedures that may be used in the course of a court-authorized psychiatric examination.

Alternative I

Provide that an examination may be conducted "in accordance with recognized normal psychiatric procedures" (Wilband v. The Queen).

Considerations

This approach provides examining psychiatrists (and/or other mental health professionals) with some discretion. While it would preclude the use of innovative, experimental procedures, it would not prohibit the use of procedures currently in use. Some of these procedures, however, may still be regarded as unduly risky or intrusive. This approach has, in effect, been adopted in the ALI Model Penal Code, which specifically provides that in any court-authorized psychiatric examination, "any method may be employed which is accepted by the medical profession for the examination of those alleged to be suffering from mental disease or defect."

There may, however, be procedures that the medical profession considers "normal" but which may be regarded by others as intrusive.

If the Code is to authorize the use of non-consensual examination/assessment, the matter of regulating the actual procedures used will be of greater significance.

Alternative II

Same as Alternative I, but provide that no examination shall include the techniques of hypnosis, narcoanalysis, or the administration of any drug to produce abreaction or a disinhibited state.

Considerations

Such a provision may be useful so long as admissions and confessions made to the examining psychiatrist are not strictly confidential and privileged. These procedures may be unfair methods of gathering evidence even where the accused has consented; during normal interrogation an accused may choose not to answer certain questions, but under hypnosis or narcoanalysis it may be impossible to properly renew or withdraw consent before answering each question. This approach, however, restricts flexibility in the use of what may be considered useful diagnostic techniques.

Issue 16

What provision should be made concerning the treatment of persons on remand?

Discussion

Under the present system, the question of treatment is governed by the common law and the provisions of provincial statute. Because the persons being dealt with have come in contact with the criminal justice system, however, the question naturally arises as to whether all aspects of the manner in which they are dealt with should not be regulated in the Criminal Code. In some provinces, psychiatrists may feel that provincial legislation does not go far enough since it may not permit the compulsory treatment of persons on remand under the Code. Arguably, however, there is no reason why persons sent for assessment by the court should be in a position different from that of ordinary psychiatric patients as regards the general requirement for voluntary informed consent and the exceptions thereto.

Alternative I

Authorize compulsory treatment where the accused is incompetent to give or withhold consent to treatment

and, in the opinion of the physician in charge, it is necessary:

(1) to protect the health or safety of the person under psychiatric remand or that of others; or

(2) to render the person fit.

Considerations

Treatment to Protect the Health or Safety of the Person Under Psychiatric Remand or That of Others

Such a provision may be considered rational and humane by many. On the other hand, this approach may not adequately protect or respect the fundamental rights of the accused, and may give rise to Charter challenges (s.7). In addition, this approach may entail difficulties in predicting danger to health or safety.

Treatment to Render the Person Fit

If a mentally incompetent person who might otherwise be subjected to the possibility of indefinite confinement under a warrant of the lieutenant governor can be rendered fit, there is an argument for the authorization of compulsory treatment.

As previously suggested, however, this approach would provide psychiatrists (and/or other mental health professionals) with greater power to treat individuals who have been accused (though not necessarily convicted) of offences than they would normally have.

Alternative II

Provide that compulsory treatment may only be ordered by a court upon being satisfied:

(1) that the accused is mentally disordered;

(2) that the accused appears to be unfit or a danger to him- or herself because of mental disorder;

(3) that treatment is likely to render the accused fit or to protect the health or safety of the accused; and

(4) that the accused is mentally incompetent to give or withhold consent.

Considerations

While this approach would judicialize the decision regarding compulsory treatment of persons under remand, it is arguable that unless the accused is allowed to participate in such a process, this mechanism would become a mere "rubber stamp" of the doctor's recommendation and would therefore be redundant. If, on the other hand, the accused is allowed to participate, the procedure may in some cases amount to a form of fitness hearing. If so, the matter of compulsory treatment might be better dealt with after a finding of unfitness at a real fitness hearing.

Alternative III

Provide that, subject to the ordinary common law exceptions, no person remanded or ordered to attend for observation/assessment/examination shall be provided any treatment without his or her consent.

Considerations

This approach would embody current practices in most provinces. "Consent" in this alternative includes substitute consent, which may be required in specific cases (e.g., in the case of an incompetent patient).

Issue 17

Assuming examination is permitted, what provision should be made with respect to the presence of counsel?

Discussion

Insofar as the results of psychiatric examination may affect crucial issues concerning the accused's liberty, there is an argument for monitoring the procedures used during such an examination by counsel. The Code makes no provision either providing for or excluding the presence of counsel.

Alternative I

Provide that any person undergoing a court-authorized psychiatric examination has the right to have counsel present.

Considerations

Several American courts have held that accused persons undergoing court-authorized psychiatric examination have this right. Counsel, if present, might notice improprieties in the procedure which the person being examined might not notice, thereby enhancing his or her ability to cross-examine. Counsel's presence would enable him or her to discover the exact methods used in the examination, thereby enhancing his or her ability to challenge the examiner's conclusions, if necessary. (At present the trier of fact tends to accept psychiatric opinions, at least on the issue of fitness). By being present, counsel would be able to advise the accused not to answer certain questions or participate in certain examination procedures that might have prejudicial consequences. By being present, counsel would be able to ensure that there is voluntary informed consent where required. In some states, the right to counsel during psychiatric examination has been statutorily enacted.

The right to have counsel present may not, however, be required by the Charter. In many American cases, the courts have rejected the notion that accused persons have the right to have counsel present in these circumstances under the Sixth Amendment. The presence of counsel may well interfere with objective psychiatric assessment. Moreover, where psychiatric examination takes place on several occasions during a long period of time (e.g., 60 days) arranging for the presence of counsel may prove to be extremely cumbersome.

Alternative II

Provide that both defence and Crown counsel may be present.

Considerations

Under this approach the prosecution would have the same opportunity to enhance the effectiveness of its cross-examination of the examining psychiatrist(s) as defence counsel would have. The presence of counsel for the

prosecution, however, may have even more potential for interfering with the accuracy of the results of the examination than does the presence of defence counsel. The accused might become even more inhibited in his or her responses to questions by the examiner, thereby making valid assessment more problematic. The presence of counsel for the prosecution may also increase the likelihood of self-incrimination. The present practice of many psychiatrists is to treat incriminatory statements as confidential, particularly where they are irrelevant or are not essential to diagnosis. Under present law, however, psychiatrists may be compelled to divulge such information in court. The presence of counsel for the prosecution would impede the efforts of psychiatrists to keep statements to themselves, and might increase the frequency with which psychiatrists are required to repeat them in court.

Alternative III

Provide that neither Crown counsel nor defence counsel shall be present.

Considerations

This approach would minimize interference with psychiatric examination. While this alternative does not provide the accused with many of the safeguards described above, the absence of Crown counsel still provides some protection to the accused in terms of self-incrimination.

Alternative IV

Provide that the question of whether counsel should be permitted to be present during the examination is a matter for the discretion of the court.

Considerations

As noted earlier, the presence of counsel may not be required by the Charter. Several American courts have held this to be a matter for the court's discretion. This alternative allows the court to weigh the merits in each case.

For the reasons alluded to earlier, however, it is arguable that the presence of counsel should be an absolute right.

Issue 18

Assuming examination is permitted, what provision (if any) should be made for the presence of a psychiatrist retained by the accused?

Discussion

Here again the extent to which psychiatric examination should be monitored is at issue. Allowing the presence of a psychiatrist retained by the accused, in addition to or instead of the presence of counsel, is another means of safeguarding the freedom of the accused. Currently, the Criminal Code contains no provisions either permitting or prohibiting the presence of a psychiatrist retained by the accused.

Alternative I

Specifically provide that the court "may direct that a qualified psychiatrist retained by the [accused] be permitted to witness and participate in the examination" (ALI Model Penal Code s. 4.05).

Considerations

A psychiatrist who was present during the court-authorized examination could better assist defence counsel in preparing cross-examination of the psychiatrist who conducted the examination of the accused. The presence of the defence psychiatrist may also improve the calibre of the examination conducted, and may reassure the accused and make him or her more cooperative. It might also help minimize differences of opinion between defence and Crown psychiatrists.

This approach might, however, be unduly cumbersome, costly and difficult to arrange. Furthermore, the use of the word "may" gives the court discretion and therefore does not guarantee this right to the accused.

Alternative II

Same as Alternative I, but substitute the word "shall" for "may."

Considerations

This approach would have all of the advantages described for Alternative I and would also respond to the concern that the presence of a psychiatrist for the accused should be an absolute right. However, the concern that this approach might be unduly cumbersome, costly and difficult to arrange remains.

Issue 19

What provision should be made with respect to the duration of remands?

Discussion

While no minimum period is stipulated, all Criminal Code provisions that allow for remand in custody for observation specify that such remand may normally only be "for a period not exceeding thirty days...." The issue of duration is important for several reasons. While the current provisions are flexible in that they provide inter alia for custodial remands up to 30 days and specify no minimum remand period (thus allowing for very short remand where appropriate), in practice the maximum period is often ordered whether it is required or not. The result in such circumstances may be unnecessary detention. Conversely, there may be instances in which a longer remand than that which is currently provided for may be appropriate.

A period of remand longer than the usual 30 days may be authorized in some cases, as the Code provisions allow for remand in custody "for a period of more than thirty days but not exceeding sixty days where [the justice, court, judge, magistrate, etc.] is satisfied that observation for such a period is required in all the circumstances of the case and his opinion is supported by the evidence or, where the prosecutor and the [accused, defendant, offender or appellant] consent, by the report in writing, of at least one duly qualified medical practitioner."

Note that the 30 day provision in s.465(1)(c)(ii) would appear to conflict with the general requirement of

s.465(1)(b) that "no...adjournment shall be for more than eight clear days...." The only exceptions that appear in s.465(1)(b) are those situations where "(i) the accused... and the prosecutor consent..." or "the accused is remanded for observation under subparagraph (c)(i)...." Remand under sub-para. (c)(ii) is not referred to. Arguably, this means that while an accused can be remanded for a maximum of thirty days under s.465(1)(c)(ii), any period in excess of eight clear days must be with his or her consent and that of the prosecutor. The reference in s.465(1)(b)(ii) to "sub-paragraph (c)(i)..." is an apparent error.

Alternative I

Same as status quo, but limit the duration to 3-5 days where the purpose of remand is assessment of fitness, and allow for renewals of this period where necessary (Lindsay).

Considerations

In practice, a short period is generally all that is required to determine fitness. This approach would therefore give substance to the "least restrictive alternative" principle. It would also be consistent with s. 7 of the Charter.

If this is the only change made in the status quo, however, certain problems will remain. Where a 30-day remand is ordered and it turns out not to be long enough, it is doubtful that under the current Code provisions the remand could simply be extended to a 60-day remand. Successive 30-day remands are not permissible, according to one case.

Alternative II

Provide for 30-day and 60-day remands "or such longer period as the Court determines to be necessary for the purpose..." (ALI Model Penal Code, s. 4.05).

Considerations

This approach provides for longer examination, which may be appropriate for some purposes (e.g., accurate diagnosis). In addition, where the accused's fitness is at issue, and treatment may be required to achieve fitness, a longer remand period may be desirable.

On the other hand, failure to specify a maximum limit may be seen as unfair to accused persons who have not yet been found guilty. This approach may also be challenged under ss.7 and 15(1) of the Charter. (See also s. 1(b) of the Bill of Rights).

Alternative III

Same as Alternative I, but do not limit renewal to cases where the issue of fitness is involved.

Considerations

There may be cases other than those where fitness is an issue, where 3-5 day renewable remands would be appropriate.

Issue 20

What provision should be made with respect to the number of remands allowed?

Discussion

Under current Criminal Code provisions, it may not be possible to order successive remands where the first remand allowed insufficient time. The Code makes no specific provision as to the number of remands allowable.

Alternative I

Allow for successive remands where more time is required.

Considerations

Sometimes a longer period of observation than that which has been ordered may be required for diagnostic purposes. In addition, a longer period than that which has been ordered may be required in order to provide treatment that will stabilize the accused and, perhaps, render him or her fit to stand trial. Moreover, in cases where the accused deteriorates following the initial remand, moreover, it is not clear under the current provisions that an additional remand can be ordered. This approach would respond to such concern.

It might be argued, however, that the examining psychiatrist and the court should not have the authority to detain an accused indefinitely under the Criminal Code, particularly if such person has not been convicted of any offence. Successive remands may amount to indefinite detention, which may infringe ss. 7 and 15(1) of the Charter (see also s. 1(b) of the Bill of Rights).

Alternative II

Allow for successive remands where more time is required and the accused consents.

Considerations

While this approach would have all of the advantages described for Alternative I above, it may avoid the potential Charter problems possible under that alternative. Arguably, however, this approach does nothing about the real problem person, i.e., the one who needs more study but refuses to consent.

Issue 21

What provision should be made with regard to the communication of psychiatric findings to the court following a "psychiatric remand"?

Discussion

The Criminal Code's observation provisions clearly contemplate that the results of any court-authorized observation will ultimately be made known to the court. This fact is particularly apparent in the wording of ss. 465(3) and 738(7), which envision that the question of whether there appears to be sufficient reason to doubt the accused's or defendant's fitness in order for a trial of the issue to be directed will be determined "as a result of observation made pursuant to an order issued under [paragraph (1)(c) or subsection (5), respectively]." Nevertheless, there exist no provisions in the Criminal Code governing the manner in which the results of observations are to be received by the court. This situation is particularly puzzling in light of the elaborate provisions, discussed above, relating to the reception of "the evidence, or where the prosecutor and the accused consent,... the report in writing, of at least one duly qualified medical

practitioner..." (emphasis added) for the purposes of obtaining a court order for observation. By way of contrast, the observation provisions contained in the mental health legislation of some provinces make specific provision for the reception of written (as opposed to oral) psychiatric reports following court-authorized observation.

Alternative I

Provide for the submission to, and reception by, the court of a written report and permit either side, with leave of the court, to require the attendance of the examining mental health professional for the purpose of cross-examination.

Considerations

The current general practice is for the examining psychiatrist to submit a report to the court, despite the failure of the Code to specify that this is required. In the absence of any explicit statutory requirement for the submission of a report, however, it is possible that the disclosure of information to the court by a physician who is not under subpoena would constitute breach of a statutory duty of confidentiality. Providing for the submission and reception of written reports is consistent with provisions in provincial mental health statutes. It is a speedier procedure than requiring the oral evidence of the examining mental health professional(s) at this point. Oral evidence (and consequent cross-examination) may not be particularly necessary at this point because there will be ample opportunity to cross-examine the examining mental health professional(s) at the fitness hearing if one is directed and they are called as witnesses. While psychiatric reports may contain irrelevant and potentially prejudicial information or opinions, judges are used to dealing with this problem.

This approach would allow cross-examination where necessary, but would not necessarily require such a cumbersome procedure. In addition, it would be similar to that which is already in place with regard to the analysis of substances under s.237(4) of the Code, s. 30(2) of the Food and Drugs Act and s. 9(2) of the Narcotics Control Act.

On the other hand, the submission and reception of written reports approach would be inconsistent with the Code's present general requirement for the oral evidence

of "at least one duly qualified medical practitioner...." Furthermore, this approach is inconsistent with the absolute right of cross-examination set out in several sections of the Code. Though cross-examination may not be necessary in cases where a fitness hearing is ultimately directed and the examining mental health professionals are then called to give oral evidence (at which point there will be ample opportunity for cross-examination), it may be crucial in cases where the court would not otherwise be inclined to hold a trial of the fitness issue on the basis of the opinion(s) of the examining mental health professional(s) and one side or the other wishes to have a trial of the fitness issue directed. In addition, psychiatric reports to the court may contain information or opinions that are irrelevant to the issue for which the "psychiatric remand" was made, inadmissible or of marginal probative value on other issues, yet of great prejudicial effect to the accused on such other issues. While judges may instruct themselves to disregard such material, it is arguable that the need for them to go through such mental contortions should be obviated if possible.

Alternative II

Same as Alternative I, but do not require leave of the court in order for either side to compel the attendance of the examining mental health professional(s)for cross-examination (see Bill S-33, s.43).

Considerations

While this approach would have the same disadvantages as those indicated for Alternative I, it would be more consistent with the general right of cross-examination than that described in that alternative.

Alternative III

Require the oral evidence of the examining mental health professional(s) except where the prosecution and defence consent to the reception of the report(s) in writing of the examining mental health professional(s).

Considerations

This approach would be consistent with the Code's provision concerning the medical evidence necessary for

remand. It would also allow cross-examination of the examining mental health professional(s) and would enable counsel to prevent, to a greater extent, extraneous and prejudicial material from being placed before the trial judge.

Issue 22

What provision should be made with regard to the communication of psychiatric findings to counsel following a "psychiatric remand"?

Discussion

Although the current general practice is for both sides to receive copies of a mental status report following a remand, there are no statutory provisions that require such reports to be provided. It may be essential for counsel to have this material to adequately prepare for court proceedings, such as the trial of an issue of fitness to stand trial.

Alternative I

Specify that a copy of the report(s) of the findings of the examining mental health professional(s) must be sent to both counsel for the defence and counsel for the prosecution (see Bill S-33, s.42).

Considerations

Under this alternative, both sides would be guaranteed the information necessary to prepare for the court proceedings. It may be argued, however, that the prosecution should not have automatic access to a report that may, in addition to containing information relevant to the issue of fitness, contain information that directly or indirectly incriminates the accused. (This difficulty would be alleviated to a great extent by the limited "psychiatric privilege" created by s. 165 of Bill S-33).

It might also be argued that neither the prosecution nor the defence should automatically be entitled to a copy of the mental status report, since such a report might contain information which, if made known to the accused, could be harmful to the accused's mental condition or endanger the safety of third party "informants."

Alternative II

Specify that the court may require that copies of the report(s) of the examining mental health professional(s) be sent to counsel for the defence and/or counsel for the prosecution unless, in its opinion, providing such report(s) to counsel would unduly endanger the health or safety of the accused or another person.

Considerations

This alternative generally allows both counsel to have copies of the report(s), but addresses itself to the problem raised above under Alternative I. On the other hand, by allowing the court to withhold from the accused information on which it may later rely in reaching a decision, it may deny the accused the opportunity to know the case he or she must meet. This may constitute a violation of s.7 of the Charter and may result in unchallenged and inaccurate information forming the basis of a judicial decision.

Issue 23

What provision should be made with regard to the contents of mental status reports?

Discussion

The Code makes no provision as to the contents of mental status reports following remand. In the absence of any specific provisions, psychiatrists who conduct observations under the authority of a Criminal Code order are left without guidance as to the contents of their reports. The result is that the nature, amount and relevancy of the information contained in such reports may vary considerably in practice.

Alternative I

Depending on the purpose for which remand was ordered, require that the examining mental health professional address himself or herself to a check-list of specific issues (Rule 3.211(a)(1) of Florida's Rules of Criminal Procedure, ALI Model Penal Code).

Considerations

This approach may result in more specific and relevant reports in many instances. Arguably, however, it might result in the imposition of legal standards on medical decisions.

Alternative II

Same as Alternative I, but specify that the report shall contain no material other than an assessment of the accused on the criteria enumerated in the checklist.

Considerations

This approach would help keep out extraneous or prejudicial material, and would provide guidance to mental health professionals as to what is expected of them. On the other hand, this approach might unduly limit the reporting mental health professional. Alternatively, it may be argued that this approach does not go far enough since it does not exclude possibly incriminating statements made by the accused that illustrate the basis of the professional's opinion.

Alternative III

Same as Alternative I or II but specify that the report shall contain no statements that may be construed as admissions or confessions by the accused.

Considerations

This alternative would prevent, to the maximum extent possible, prejudicial information from being put before the court. It may be argued, however, that if the statements show the basis of the opinion, they should be left in; if the basis for the opinion is not known, it may be difficult to assess the weight it should properly be given.

Issue 24

What provision should be made with respect to informing the accused of the possible evidentiary consequences of psychiatric remand or examination in advance?

Discussion

At present, psychiatric remand may have serious evidentiary consequences for the accused. Unlike police interrogation, psychiatric examination may be assumed by the accused to be a confidential procedure. Moreover, the methods of psychiatry may be more persuasive than police interrogation, particularly where techniques such as hypnosis or narcoanalysis are used. In light of these facts, a warning to the accused as to the possible evidentiary consequences of psychiatric remand or examination may be seen as inherently fair.

The Criminal Code makes no provision with respect to informing the accused of the possible evidentiary consequences of psychiatric remand or examination in advance.

Alternative

Provide for a warning as to the possible evidentiary consequences of psychiatric remand or examination in advance.

Considerations

Such a provision would address itself to the concerns raised in the discussion above. It may be argued, however, that informing the accused might cause him or her to be so inhibited in his or her communications during examination that an accurate assessment will be impeded. Such a provision might also discourage an accused from voluntarily providing useful evidence.

Issue 25

What provisions should be made regarding the consequences of the accused's failure to cooperate in examination?

Discussion

The extent to which the subject of an observation order is required to cooperate in the "observation" is not made clear by the provisions of the Criminal Code. Where the person in question is less than fully cooperative, therefore, it is equally unclear what consequences may result. Essentially, there are two

possibilities: (1) penal consequences, and (2) evidentiary consequences. With regard to the former, it is notable that provisions in the mental health legislation of some provinces are considerably more explicit than the Criminal Code on the question of what may be required of the subject under "psychiatric remand."

It may be argued that an order under the Criminal Code, by specifying the purpose for which a person may be remanded or directed to attend (i.e., "for observation"), implicitly requires the person to cooperate beyond merely submitting peacefully to the remand or "attend[ing] at [the] place or before [the] person specified in the order... within the time specified therein...." If this is so, it is possible that a failure to answer questions and to take part in the various tests suggested by authorized "observers" would put the subject in violation of the order. What case law and commentary exists, however, suggests that this is not the case. Certainly there is a dearth of case law to suggest that persons with respect to whom an observation order has been made under the Code must submit to examination or else be subject to criminal penalty.

Alternative I

Specifically provide for penal and/or evidentiary consequences (e.g., a possible adverse inference regarding the strength or existence of any "psychiatric defence" put forward, or a judicial comment to the trier of fact (see Bill S-33, s.95)).

Considerations

While many would see this approach as fair and logical, it may also be viewed as an indirect abridgement of the so-called right to be silent, or the right not to be compelled to furnish evidence against oneself.

This approach would seem at first glance to be consistent with the breathalyzer provisions of the Code, which contain penalty and adverse inference provisions for failure to provide a breath sample. The analogy to the breathalyzer provisions may be false, however, because: (1) psychiatric examination arguably has not been demonstrated to be as objective and reliable as the breathalyzer; and (2) the penal and evidentiary conse-

quences in the breathalyzer provisions do not apply where the breathalyzer test is sought to be administered for the purpose of rebutting a defence.

Alternative II

Specifically provide that no psychiatric defence may be left with the trier of fact where the accused has failed to cooperate in a court-ordered psychiatric examination designed to inquire into the basis for such defence.

Considerations

This approach would help to overcome the disadvantage at which the Crown is put when the accused refuses to be examined. If, however, the refusal to cooperate is due to mental disorder, this approach may be both unfair and illogical.

Alternative III

Specifically provide that no penal consequences or adverse inference shall be drawn from an accused's failure to cooperate in examination.

Considerations

While this approach would, arguably, protect the accused's interests to the maximum extent possible, it might place the prosecution at an unfair disadvantage by making any "psychiatric defence" raised by the accused invulnerable.

Chapter 3

FITNESS TO STAND TRIAL

FITNESS TO STAND TRIAL

INTRODUCTION

In the section on remand, it was noted that the mental state of an accused person may be relevant to various issues that may arise in the course of a criminal trial. As further indicated in that section, one of the main purposes of orders for psychiatric observation currently relates to the issue of fitness to stand trial. In this section, the procedure for determining fitness will be examined.

At the outset, some consideration should perhaps be given to the purpose of the fitness rule. As the Law Reform Commission of Canada has recognized, there has been some confusion in this regard. In the Commission's view, the purpose of the fitness rule is to promote fairness to accused persons by protecting their right to defend themselves, and by ensuring that they are appropriate subjects for criminal proceedings. The Commission went on to suggest that the procedure for determining fitness should be formulated so as to be in accord with this interpretation. As will become apparent throughout the course of this section, however, the meaning of the word "fairness" in our present context is susceptible of conflicting interpretations, depending on whether one views it as "fairer" to err on the side of fitness or unfitness.

ISSUES

Issue 1

What provision should be made with respect to the test for fitness?

Discussion

Under the present law, unfitness must be due to "insanity," a vague and undefined concept. The trend in Canadian jurisprudence has been to restrict the application of the word "insanity" to mental disorder. Although mental retardation has, in effect, been held to fall within the definition of "insanity" for the purpose of the Code's fitness provisions, our courts seem most frequently to have included psychotic disorders within its meaning. This is not to say, however, that psychotic

accused persons are invariably found unfit when the issue is tried. As the wording of the Code provisions suggest, a finding of unfitness requires the "insanity" to have rendered the individual incapable of "conducting his defence."

Perhaps conditions other than insanity which substantially interfere with the ability to conduct one's defence should be included. The Code does not define what abilities are necessary in order for one to conduct one's defence, resulting in a lack of uniformity in the approaches taken in the case law. In addition, the Code's failure to specify the criteria on which fitness is to be judged makes assessment difficult for mental health professionals and contributes to the conflicts in psychiatric opinion which discredit psychiatric evidence. In light of the extreme vagueness of the Code's current concept of fitness, it is possible that the present provisions might be attacked under s. 7 of the Charter of Rights and Freedoms, which guarantees that "Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."

The Criminal Code is not very specific on the issue of what constitutes fitness or unfitness. The issue in ss. 543(1) and 738(7) is simply whether the "accused" or "a defendant," respectively, "is then, on account of insanity, unfit to stand his trial." In s. 465(3), the issue is "whether the accused is then, on account of of insanity, unfit to conduct his defence at the preliminary inquiry." According to the case law, capacity to conduct one's defence involves essentially two things: the ability to understand the proceedings; and the ability to instruct counsel. With regard to the former requirement, it has been held to be sufficient that the person "follow as much as it is necessary that he should follow of the proceedings at his trial...." As regards the latter requirement, it has been held that an inability to act with good judgment or in one's own best interests is irrelevant, and that retrograde amnesia does not in itself render a person unable to instruct counsel. While it would appear that delusions will not necessarily give rise to a finding of unfitness, the presence of delusions and/or hallucinations will usually have this effect. According to various text-writers, the capacity to conduct one's defence involves such other considerations as the ability to choose between the various pleas available, challenge jurors, examine and cross-examine witnesses and testify on one's own behalf. In the recent case of R. v. Kieling, the Trial Judge asked eight questions of each of

the expert witnesses who testified on the issue of fitness: "(1) 'Does he understand the nature of the charge against him?' (2) 'Does he understand the nature of an oath?' (3) 'Is he aware of the purposes of the trial?' (4) 'Can he distinguish the pleas that are open to him?' (5) 'Does he understand the consequences of a conviction?' (6) 'Is he able to comprehend the nature of the evidence?' (7) 'Can he give his evidence in a coherent fashion?' (8) 'Does he have the ability to instruct his counsel on the evidence that is led properly, so that he can make full answer and defence?'" Although the Judge's finding of unfitness was overturned on appeal, Rapson Co. Ct. J. made a point of expressing approval for this eight point test. The decision of the Trial Court was ultimately restored by the Ontario Court of Appeal.

Alternative I

Statutorily define unfitness as an inability to: "(i) understand the course of the proceedings of the trial so as to make a proper defence; (ii) understand the substance of the evidence; (iii) give adequate instruction to [one's] legal advisors;" or "(iv) plead with understanding..." (recommendation of England's Butler Committee).

Considerations

This test essentially codifies and enumerates the common law requirements. However, the test is unclear on what sort of "understanding" is sufficient, i.e., whether purely factual understanding will suffice, or whether rational (i.e., non-delusional) understanding is necessary. Furthermore, the expression "give adequate instruction to [one's] legal advisors...," as worded, may not accurately reflect what happens in practice. Bull has argued that in practice an accused does not instruct his or her legal advisor; more often, it is counsel who instructs the accused.

Alternative II

Statutorily provide that "A person is unfit if, due to mental disorder:

(1) he does not understand the nature or object of the proceedings against him, or

(2) he does not understand the personal import of the proceedings, or

(3) he is unable to communicate with counsel."

Specifically exclude lack of memory as a factor which in and of itself negates fitness. (Law Reform Commission recommendation).

Considerations

This test comes close to articulating the requirement for a rational (as opposed to merely factual) understanding, although it is still not clear as to whether rational understanding is necessary. Specific statutory exclusion of memory failure would avoid confusion as to what is meant by the ability to "communicate with counsel," although it may still be argued that amnesia should in itself amount to unfitness.

Alternative III

Same as Alternative I or II, but add genuine amnesia relating to the period during which the offence was alleged to have been committed as an independent criterion.

Considerations

Genuine amnesia constitutes a serious handicap to an accused person, making it extremely difficult (if not impossible) to instruct counsel and prepare a defence. This approach acknowledges that the amnesiac is in a worse position than someone who, for example, has lost his or her diary or is unable to trace a witness (Butler Committee examples); while such a person knows his or her defence and is merely unable to come up with the evidence, the amnesiac may have no idea what his or her defence might be (Butler Committee).

On the other hand, as the Butler Committee majority argued, amnesia is easily (and often) feigned. Moreover, in many cases, there is no sure way of determining whether an alleged amnesiac is malingering. Arguably, the accused with amnesia is in no worse position than the accused who has a poor memory for reasons not related to mental disorder. Such difficulties should not prevent the trial from proceeding.

Alternative IV

Statutorily provide that a person is unfit if because of a mental disorder, he or she does not have:

(1) "sufficent present ability to consult with" counsel; and

(2) "a rational as well as factual understanding of the proceedings" against him or her (Dusky v. United States).

Considerations

This test, which has been adopted by statute in several American states, may be wider than those in Alternative I or II, as it clearly specifies that a factually correct but delusional notion of what the proceedings are about would not satisfy the fitness test. This test does not however, explicitly exclude or include amnesia as a ground for unfitness in itself. It may be argued, moreover, that a purely factual understanding should suffice.

Issue 2

Who should be allowed to direct the issue of fitness to be tried?

Discussion

The Code's main fitness provision is that contained in s.543. It may be used by a court, judge or magistrate trying an accused person charged with an indictable offence. Section 465 contains a provision allowing for a justice acting under Part XV to direct the issue of fitness to be tried. Section 738(7) allows a summary conviction court to direct that the issue of fitness be tried and, by s. 755(4), applies mutatis mutandis in the case of summary conviction appeals determined by trial de novo. There are no specific provisions in the Code relating to trial of the fitness issue by summary conviction appeal courts under Part XXIV or by courts of appeal under Part XVIII. However, s. 610 of the Code allows for the examination and cross-examination of witnesses, etc., where appeals are taken under Part XVIII, and this provision has been incorporated into the summary conviction appeal procedure by s. 755(1).

Alternative I

Maintain status quo, but preclude justices acting under Part XV of the Code from trying the issue of fitness without the consent of the accused.

Considerations

It is arguable that the power of justices acting under Part XV of the Code to try the issue of fitness to conduct one's defence at a preliminary inquiry runs contrary to the philosophy behind allowing postponement of the issue until after the close of the case for the prosecution at trial. If a potentially unfit accused who has been committed for trial can have the issue of fitness postponed until the close of the case for the prosecution, perhaps accused persons who are potentially unfit during a preliminary inquiry should have the right to have the issue of fitness postponed until the close of the case for the prosecution at trial. This option would enhance the right of potentially unfit persons to have the case against them put to the test at the preliminary inquiry and would eliminate any conflict in the present provisions. At the same time, this option would protect the rights of unfit persons not to be subjected to court proceedings if they do not want to be.

On the other hand, depriving an accused of the right not to be committed for trial following a preliminary hearing at which he or she was incapable of conducting his or her defence may be contrary to s. 7 of the Charter (see also s. 2(e) of the Bill of Rights). Furthermore, preventing justices acting under Part XV from trying the issue might make their remand powers virtually useless. It might also be a waste of valuable treatment time; an accused who would doubtless be found unfit to stand trial would be deprived of the chance to receive sufficient treatment to become fit by then.

Alternative II

Provide that the issue of fitness may be tried by any justice, court, judge, magistrate, appeal court, court of appeal or summary conviction court before whom an accused, defendant or offender appears.

Considerations

This alternative would, in effect, allow the issue of fitness to be tried by all judicial bodies before whom an accused may appear. This procedure would therefore enhance the right of accused persons not to be subjected to court proceedings while unfit. Although there may be benefits in doing this, it may be argued that such a provision would amount to over-kill. It may not be necessary, for example, for a person to be fit before he or she can undergo a bail hearing or be sentenced.

Issue 3

Who should be permitted to raise the issue?

Discussion

The Criminal Code is silent as to who may raise the issue of fitness. It is, therefore, generally assumed that the issue may be raised by either the defence or the prosecution, or by the court itself for that matter.

Alternative I

Specify in the Code that the issue of fitness may be raised by the defence, by the prosecution or by the court (Law Reform Commission of Canada).

Considerations

This approach is consistent with the right of accused persons not to be convicted without a fair trial (see s.2(e) of the Bill of Rights and s. 7 of the Charter), since it would allow fitness to be raised for the unrepresented accused who is too disordered to raise the issue for him- or herself.

This approach may, however, prevent the accused who wishes to proceed to trial as quickly as possible from doing so. Furthermore, allowing the court to raise the issue may introduce inquisitorial features which may be seen as incompatible with the adversary system. Allowing the prosecution to raise the issue, at least under the present system, may tempt the prosecution to prove unfitness rather than proving its case where the former is easier than the latter.

Alternative II

Specify in the Code that the issue of fitness may only be raised by the defence.

Considerations

While this approach would respond to the criticisms raised above with regard to Alternative I, there are at least two major drawbacks. Under the present law, it would be possible for an unfit accused to deliberately fail to raise the issue of fitness and, if convicted, appeal on the ground that he or she was unfit. If the court and prosecution were prevented from raising the issue at trial, the number of appeals on the ground of unfitness might increase dramatically. In addition, this approach would be inconsistent with the right of unfit persons not to be convicted without a fair trial (which they themselves might have prevented because their unfitness prevented them from raising the issue of their fitness) and might infringe s. 7 of the Charter (see also s. 2(e) of the Bill of Rights).

Issue 4

What provision should be made concerning notice prior to a trial of the issue of fitness?

Discussion

The issue here is essentially the same as that raised with regard to notice prior to remand. As mentioned above in that context, some applications require that notice be given to the other party or to certain persons interested in the litigation. Where notice provisions exist, their exact terms vary from one statutory provision to another. One object of notice provisions, as mentioned earlier, is to enable the respondent to prepare argument.

Currently, the Criminal Code makes no provision for notice prior to a trial of the issue of fitness. Theoretically, under s. 543 of the Code, the court could hold a fitness hearing without there having been a remand, and therefore without prior "notice." Because the issue of fitness often arises spontaneously, it may be argued that a notice provision would be impractical. As in the case of remand, however, it is possible that the absence of the notice

requirement may render the current fitness provisions susceptible to an attack based on s.7 of the Charter. To forestall any such challenge, it may be advisable to consider the possibility of enacting a notice provision.

Issue 5

What provision should be made with respect to the grounds requiring the issue of fitness to be tried?

Discussion

In considering the grounds that must exist before the issue of fitness can be tried, we are again involved in the process of balancing fairness against expediency. On the one hand, the grounds must be sufficiently clear and stringent to preclude unnecessary trials of the fitness issue. On the other hand, they must not be so stringent as to constitute an unworkable impediment to the holding of necessary trials to determine fitness.

Section 543(1) of the Code currently provides that a court, judge or magistrate "may" direct the issue of fitness to be tried "where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence...." (In s. 738(7) the words "a defendant" are used instead of "the accused"). Although the imperative word "shall" is used in the fitness provisions contained in ss. 465(3) and 738(7), it would appear from the case law that the use of the permissive word "may" in s. 543(1) does not permit a trial judge to whom sufficient reason to doubt fitness has or should have appeared to choose not to direct a trial of the issue. The permissive word "may" is, however, consistent with para. (4)(a) which allows for postponement of a direction that the fitness issue be tried.

The question of whether there exists "sufficient reason" to doubt fitness has been held to be a question of law. The problem of what constitutes sufficient reason has been dealt with in a number of cases. In practice, sufficient reason to doubt fitness (where it appears) generally appears from the psychiatric report submitted following court-ordered observation. Although this is not a strict requirement of s.543, it does seem to be a requirement of both ss. 465(3) and 738(7), which provide that sufficient reason to doubt fitness must appear "as a result of observations made pursuant to an order issued under[ss. 465(1)(c) or 738(5), respectively]..." in order for a direction for trial of the fitness issue to be mandatory.

While the current provisions are broad and flexible, and are familiar to judges and lawyers, a number of criticisms may be made. For example, the present requirement for "sufficient reason to doubt...," etc., seems to beg the question and may be no test at all. What is sufficient reason? Furthermore, it is unclear whether the current words of the Code mean merely that there need only be reasonable doubt as to fitness in order for the issue to be tried, or whether the word "sufficient" raises the standard. It is also unclear what the significance of the word "appears" is. It may be argued that this word connotes a subjective test and that the test, to ensure reviewability, should be made clearly objective. The various provisions of the Code are also inconsistent. While ss. 465(3) and 738(7) require that the reason to doubt fitness must appear as the result of observations made pursuant to an order under the appropriate Criminal Code provisions, s. 543(1) does not impose any such restriction. The various provisions of the Code are inconsistent in another respect as well; while ss. 465(3) and 738(7) provide that once the grounds exist, the justice or summary conviction court shall direct the fitness issue to be tried, s. 543 uses the word "may." For the above reasons, the words "sufficient," "appears" and "may" will not be included in the following alternatives.

Alternative I

Provide that in all cases the issue of fitness shall be tried whenever there is reason to doubt an accused person's fitness.

Considerations

This approach makes it clear that the court has no discretion in the matter, thereby protecting fully the right not to be tried while unfit. It seeks to eliminate the inconsistencies referred to above, and make the test objective and clearly reviewable. Arguably, however, this test is too lax. Perhaps there should be more than just "reason to doubt" the accused person's fitness.

Alternative II

Provide that in all cases the issue of fitness shall be tried whenever, as a result of observation/examination/assessment (unless the accused has consented to having such observation/examination/assessment dispensed with) there is reason to doubt an accused person's fitness.

Considerations

This approach is similar to Alternative I but is more stringent; it makes clear the source of the reason to doubt the accused person's fitness and requires that it be supported by some evidence. Allowing such requirement to be waived on the consent of the accused would expedite the procedure and retain elements of flexibility as well as fairness to the accused. On the other hand, the requirement that the reason to doubt fitness can only be based on observation/examination/assessment may be too restrictive. It does not deal with the situation where the accused behaves strangely in court or when talking to his or her lawyer, but reveals nothing during observation/examination/assessment.

Alternative III

Use a different formula depending on whether the accused is before a justice conducting a preliminary inquiry, before a court on arraignment or trial for an indictable offence, or before a summary conviction court on arraignment or trial for a summary conviction offence.

Considerations

It is arguable that the more complex the proceedings are and/or the more there is at stake, the easier it should be to have the issue tried. Devising a different formula for each situation, however, would be a very difficult exercise. There is, moreover, no guarantee that the purpose and operation of such differences would be clear.

Alternative IV

Use a different formula depending on who raises the issue.

Considerations

Perhaps in cases where the defence raises the fitness issue, a trial of the issue should be more readily required than when the prosecution raises it. This approach would, arguably, enhance the rights of the accused; it would protect both the accused's liberty and his or her right not to be tried while unfit. On the other hand, this approach might be unnecessarily complex, and the drafting difficulties would be considerable.

Issue 6

What provision should be made with regard to the assignment of counsel?

Discussion

The possibility of unfitness necessarily raises the issue of whether the accused is able to defend him- or herself. The practical question as to when, and under what conditions, the unrepresented and possibly unfit accused should be assigned counsel must be considered.

Section 543(3) of the Criminal Code provides that "Where it appears that there is sufficient reason to doubt that the accused is, on account of insanity, capable of conducting his defence, the court, judge or magistrate shall, if the accused is not represented by counsel, assign counsel to act on behalf of the accused."

Alternative I

Provide for appointment of counsel whenever the criteria chosen from the relevant options relating to the grounds requiring the issue of fitness to be tried exist.

Considerations

Once there are grounds requiring the issue of fitness to be tried, it would seem only logical that there also are grounds requiring the appointment of counsel. This logic is reflected in the current Criminal Code provisions.

It may be argued, however, that the criteria requiring appointment of counsel should be less stringent; without counsel, it may never be brought to the court's attention that the criteria requiring the issue of fitness to be tried exist. The only way to avoid this problem would be to insist on the appointment of counsel in all cases.

Issue 7

What provision should be made with regard to the time at which trial of the issue should be directed?

Discussion

The major question here is fairness to the accused. From one standpoint, it may be argued that fairness to the accused demands that the issue of fitness be directed at the earliest possible stage of the proceedings, in order that an unfit accused person not be subjected to any part of the criminal trial. On the other hand, it may be argued that fairness to the accused demands that he or she not be subjected to trial of the issue of fitness (or treatment thereafter) where there is a good chance that the person, if tried, would be acquitted regardless of his or her present mental condition.

Section 543 of the Criminal Code, which applies in the case of indictable offences, provides in s-s. (1) that a court, judge or magistrate may direct a trial of the issue of fitness "at any time before verdict...." While it may be thought that this section allows for a trial of the fitness issue as early as the accused's first appearance in court, such interpretation is made doubtful by the provision's placement in Part XVII of the Code, by the nature of the issue under consideration (i.e., "whether the accused is then...unfit to stand his trial"), by s.543(5)'s provision that upon a finding of fitness "the arraignment or trial shall proceed...," and by the existence of s. 465(3) of the Code, which specifically enables a justice to direct trial of the issue of fitness at the preliminary inquiry stage. Under s. 465(3), it is worth noting, a justice acting under Part XV is not obliged to direct that the issue of fitness be tried until after there has been a court-ordered observation. As the provision states, sufficient reason to doubt fitness must have appeared "as a result of observations made pursuant to an order issued under paragraph 1(c)...."

In the case of summary conviction offences, the only restriction as to how early the court may direct trial of the fitness issue is s. 738(7)'s requirement that sufficient reason to doubt fitness must have appeared "as a result of observations made pursuant to an order issued under subsection (5)...." As was the case in preliminary inquiries, therefore, the issue must not be tried until after there has been a court-ordered observation.

Section 543(4)(a) of the Code provides that where the issue of fitness arises before the close of the prosecution's case, "the court, judge or magistrate may postpone directing the trial of the issue until any time up to the opening of the case for the defence...." By s-s.(7) of s. 543, moreover, "Where the court, judge or

magistrate has postponed directing the trial of the issue pursuant to paragraph (4)(a) and the accused is acquitted at the close of the case for the prosecution, the issue shall not be tried."

Note that the postponement provision contained in s.543(4)(a) does not appear to be applicable in the case of preliminary inquiries under s.465 or in the case of trials for summary conviction offences. By ss. 465(4) and 738(8), the provisions contained in s.543 become applicable only once a justice or summary conviction court respectively has directed the trial of the issue of fitness under ss. 465(3) or 738(7). In the absence of a specific postponement provision, it is an interesting question whether discretionary postponement by a justice or summary conviction court would be permissible. The Code offers no guidance concerning the grounds upon which the decision to postpone directing the trial of the issue should be made.

Alternative I

Maintain status quo.

Considerations

Section 543 allows postponement of the issue, permitting the case for the prosecution to be tested before a trial that may result in indefinite detention of the accused is directed. However, current Code provisions seem inconsistent with one another. Under s. 543, a court, judge or magistrate must direct a trial of the issue as soon as sufficient reason to doubt fitness appears to him or her, unless a postponement "until any time up to the opening of the case for the defence..." is deemed appropriate. Under ss. 465 and 738, however, the earliest time at which a justice or summary conviction court, respectively, is obliged (or allowed?) to direct that the issue be tried is following a period of court-ordered observation.

Another problem is that the Code gives no express right to justices acting under Part XV or to summary conviction courts to postpone directing a trial of the issue "until any time up to the opening of the case for the defence..." as in s.543. It is paradoxical that if a potentially unfit person is charged with an indictable offence he or she may be set free upon acquittal at the close of the case for the prosecution, while the same person charged with a less serious offence would be found unfit and subjected to the discretion of the lieutenant governor.

A third difficulty with the Code's current provisions is that they offer no guidance whatsoever as to the grounds upon which the decision whether to postpone should be made.

Finally, it may be argued that the current provisions may not go far enough, since they do not allow for the case for the defence to be presented even where there may be an affirmative defence which does not depend on the participation of the accused.

Alternative II

Require that in all cases trial of the issue of fitness must be directed as soon as the criteria are fulfilled.

Considerations

This alternative is premised on the position that if a person is unfit he or she should be provided the opportunity for treatment immediately, regardless of the possible outcome of the trial. It would ensure that no trial proceeds in which the accused cannot participate effectively.

There are, however, several arguments against this approach. First, it may be questioned what harm there is in testing the prosecution's case. Second, it is arguable that this option might encourage prosecutors to prove unfitness where they cannot prove guilt (particularly if there is a lower standard of proof required for unfitness). Third, it may be argued that if the accused is ultimately to be hospitalized, he or she may have more incentive to respond to treatment if he or she has been acquitted of criminal charges first.

Alternative III

Provide that in all cases trial of the issue must normally be directed as soon as the criteria are fulfilled, but that in all cases where the issue of fitness is raised before the close of the case for the prosecution the issue shall be postponed until the close of the case for the prosecution.

Considerations

This alternative would be consistent with judicial decisions dealing with postponement in cases where the right of the prosecution to raise the "defence" of insanity "for" the accused arises. While it may also provide more protection for the accused's right to freedom than the previous two alternatives, it may be argued that it does not go far enough in protecting the accused's right to liberty, since it does not permit the leading of an affirmative defence that does not depend on the participation of the accused.

Alternative IV

Provide that in all cases trial of the issue must normally be directed as soon as the criteria are fulfilled, but that in all cases where the issue of fitness is raised before the close of the case for the prosecution the issue must be postponed until the close of the case for the prosecution unless the defence consents to it being tried immediately.

Considerations

This approach has the same advantages as those outlined for Alternative III above, but has the additional benefit of dispensing with the necessity for the prosecution to present its case where the accused, for one reason or another, wishes to waive this right. On the other hand, this approach has the same problems or disadvantages associated with Alternative III above.

Alternative V

Provide that in all cases trial of the issue must normally be directed as soon as the criteria selected from the options for Issue 5 above are fulfilled, but that the issue may (or shall) be postponed "if having regard to the nature of the supposed disability the court are of opinion that it is expedient so to do and in the interests of the accused..." (Criminal Procedure (Insanity) Act 1964 (U.K.), s.4).

Considerations

This approach is flexible and gives discretion to the court. Because it has been used in another comparable

jurisdiction, there is case law dealing with the operation of the postponement criteria which would help with the interpretation of this type of provision.

The English case law suggests that under this test the court may decide not to postpone if in its view the accused belongs in a psychiatric hospital even if he or she is acquitted. If a similar interpretation were made in Canada, this test might be poor protection for the accused's right to liberty; it may be argued that this type of consideration should more properly be left to persons involved in the civil commitment process than to a court trying the accused for an alleged criminal offence. There is again the criticism that this approach does not allow the case for the defence to be heard. In addition, the use of the permissive word "may" appears to give the court discretion not to postpone even when the criteria for postponement have been fulfilled.

Alternative VI

Same as Alternative V but provide that the defence may consent to having the issue tried immediately.

Considerations

This approach would have the same advantages and disadvantages as those indicated for Alternative V, but has the additional advantage of automatically dispensing with postponement (thus saving time) when the accused does not wish to have the trial of the issue of fitness postponed.

Alternative VII

Permit the trial of the issue to be postponed until the end of the trial by adopting the procedure recommended by the Law Reform Commission of Canada:

> "First, an accused's fitness to stand trial should become a question of law. Because of its procedural nature and because there is no consideration of the accused's culpability, we recommend that fitness be determined by the presiding judge. Second, in jury trials where the question of unfitness has been postponed to

the end of the trial, the judge should be able to direct the jury to deliver either an acquittal or a conditional verdict. With these two changes the procedure would be roughly as follows.

If the fitness issue has been raised and both parties agree that it should be determined immediately, the trial judge may order a hearing on the accused's fitness to stand trial. Upon request by either party or where, in his opinion, it would be in the interests of justice to do so, the trial judge shall postpone determination of the fitness issue until the end of the case for the prosecution.

After presentation of the case for the prosecution, the trial judge has three possibilities: he may, on motion by the defence, acquit the accused; he may, on motion by the defence, postpone the issue to the end of the trial; or he may order a hearing on the accused's fitness to stand trial. He would only postpone the determination of the issue to the end of the trial where defence counsel has demonstrated that he has a case to present and that it would be in the interests of justice to proceed on the merits of the charge.

Postponing the fitness hearing to allow presentation of the case of the defence is relatively simple when the trial is by magistrate or judge sitting alone. Consideration of fitness is postponed to the end of the trial. After having heard all the evidence and the summations of both parties, the presiding judge has two alternatives; he may acquit the accused or direct that the issue of fitness be determined. If the accused is found fit to stand trial, a conviction is entered.

In the case of trial by jury the procedure to postpone to the end of the trial is somewhat different. The trial judge would postpone the issue until all the evidence at trial had been heard. He would then direct the jury to consider the guilt or innocence of the accused. If the jury delivered a verdict of not guilty the accused would be acquitted and there would be no fitness hearing. If the jurors thought the accused guilty of the charge, they would

deliver a conditional verdict that on the evidence presented to them they are unable to acquit the accused. The verdict is conditional in the sense that it is a verdict of guilty if the accused is fit. The judge would then dismiss the jury and a hearing on the accused's fitness would be held. If the accused is found fit the conditional verdict would be made absolute and the judge would sentence the accused. If unfit, the judge would set aside the verdict and the trial proceedings and make an order for the disposition of the unfit accused."

Considerations

This approach provides maximum protection for the rights of the accused. It allows the fitness of the accused to be assessed in a more accurate manner, i.e., to be put to the test of an actual trial. On the other hand, especially where lengthy trials are involved, this approach could prove to be a very costly and time-consuming burden on our already over-burdened criminal courts. In addition, implementation of this approach could induce accused persons to feign unfitness at the outset of their trials as a possible "insurance policy" allowing for a new trial should they be found guilty. It should be noted that in a recent Canadian survey, (Eaves et al.), 89.2% of judges questioned, 84.1% of the Crown attorneys questioned and 82.2% of defence counsel questioned disagreed with the Law Reform Commission's proposal that trial of the fitness issue be postponable to the end of the trial.

Alternative VIII

Require that in all cases trial of the issue of fitness shall be directed as soon as the criteria selected above are fulfilled but that "If the [accused] is found to be [unfit] there should nevertheless be a trial of the facts to the fullest extent possible having regard to the medical condition of the [accused]." Provide that "If a finding of not guilty cannot be returned the [trier of fact] should be directed to find 'that the [accused] should be dealt with as a person under disability.' This new verdict should not count as a conviction nor should it be followed by punishment" (Butler Committee recommendation).

Considerations

As in Alternative VII, this approach allows the fullest opportunity for the accused to be acquitted, thereby making the trial of the fitness issue unnecessary. On the other hand, however, concerns raised for that alternative apply here as well.

Issue 8

Who should try the fitness issue?

Discussion

Here the main issues are: (1) whether, and in what circumstances, the trial of the fitness issue should be before a judge alone or before a judge and jury; and (2) whether, and in what circumstances, the trial of the fitness issue should be before a different court than the one trying the issue of guilt. These questions require consideration of fairness to the accused on the one hand, and expediency and cost on the other.

Subsections (4)(b) to (6) of s. 543 set out the procedure to be followed once a trial of the fitness issue has been directed. In cases where the trial is held or to be held before a judge and jury, and the judge directs the issue to be tried before the accused is given in charge to the jury for trial, the issue must normally be tried by twelve jurors. In the Yukon Territory and Northwest Territories, only six jurors are required. Where the judge directs the issue to be tried after the accused has been given in charge to a jury for trial, the jury must be sworn to try the issue of fitness in addition to that on which they have already been sworn. In cases where the trial is held before a judge sitting without a jury or before a magistrate, the issue must be tried by that judge or magistrate, as the case may be.

Where, following the trial of the fitness issue, the verdict is that the accused is fit, the arraignment or trial proceeds as if the issue had not been directed. Where the verdict is that the accused is unfit, "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.

Alternative I

Provide that in all cases the issue shall be tried by a jury.

Considerations

If a finding of unfitness continues to result in the possibility of long-term or indefinite detention, perhaps the seriousness of such a finding requires the right to trial by jury. If trial by jury is guaranteed to persons facing imprisonment for five years or more upon conviction for an offence (by s. 11(f) of the Charter), perhaps it should be guaranteed in these circumstances as well. This procedure, however, would make many trials considerably more cumbersome and expensive.

Alternative II

Provide that in all cases the issue shall be tried by a jury unless the defence elects to have it tried by the court without a jury.

Considerations

This approach has the advantages and disadvantages described for Alternative I above, but has the added advantage of dispensing with the cumbersome necessity for a jury trial where the accused wishes to waive this right.

Alternative III

Provide that in all cases the issue shall be tried by the court without a jury.

Considerations

This procedure would be speedier than that suggested in Alternative I in cases where there is not already a jury present. Even where a jury has already been empanelled, this provision would avoid lengthy jury deliberations. In the case of jury trials, this provision has an advantage over the status quo; presumably, the jury would be absent from the fitness hearing and would not be subjected to evidence that might prejudice them on the issue of guilt.

It is noteworthy that despite the latitude of the concept of "due process" under the Fifth Amendment, the United States' Federal incompetency provisions (18 USCS,s. 4244), which provide that the findings shall be made by the trial judge, have been upheld. This fact suggests that this alternative would likely not have "due process" (i.e., Charter s. 7) problems in Canada. This approach, however, ignores all of the advantages that a jury trial would have (described under Alternative I above).

Alternative IV

Provide that in all cases the issue shall normally be tried by the court without a jury unless the defence elects to have it tried by a jury.

Considerations

This approach would be essentially the same as that described for Alternative II. Here, however, non-jury trials would be the norm, effecting time and cost savings.

Alternative V

Provide that "The issue of [fitness] should be decided by the judge except if the medical evidence is not unanimous and the defence wish a jury to determine the issue" (Butler Committee).

Considerations

Arguably, a jury trial would serve no purpose where medical evidence is unanimous. As the Butler Committee has noted: "In such circumstances it does not greatly matter whether the issue is decided by the judge or jury, since in effect the judge decides and the jury will normally follow his direction." This approach has the advantages and disadvantages of Alternative IV above. It is likely that this alternative would be rarely used, however, since it presupposes that the court will have all the medical evidence before it prior to the trial of the issue.

Alternative VI

Apply any of the above alternatives, but provide as well that where the accused is found to be fit "The full

trial...[shall] take place before a differently constituted court from that which decided on the [fitness] issue" (Butler Committee).

Considerations

This approach would prevent the court trying the issue of guilt from being prejudiced by evidence led at the fitness hearing, particularly if no privilege exists with regard to statements made in the course of court-ordered mental status observation/examination/assessment. This approach was recommended by the Federal/Provincial Task Force on Uniform Rules of Evidence, even though it recommended privilege except on the issue of fitness. "Otherwise," the Task Force felt, "the same jury which heard a confession at the fitness hearing would be expected to ignore the confession at trial." In spite of the advantages discussed above, this approach would be more cumbersome, costly and time-consuming than the present procedure.

Issue 9

What provision should be made concerning the presence of the accused at the trial of a fitness issue?

Discussion

Section 577(2)(c) of the Code currently provides that "The court may...cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is, on account of insanity, unfit to stand his trial where it is satisfied that a failure to do so might have an adverse effect on the mental health of the accused." This provision appears in Part XVII of the Code, which relates to procedure by indictment, and does not appear to have been incorporated into the procedures allowing justices conducting preliminary inquiries or summary conviction courts to hold a trial of the fitness issue.

This provision may be criticized on the basis that it is premised on a theory as to the cause of mental deterioration which is extremely difficult to either substantiate or refute by empirical evidence. If the purpose of this provision is to prevent the accused from hearing his or her mental condition discussed, its logic may be seen as somewhat paradoxical; unless the court is required to judge the mental condition of the accused on the basis of evidence that has not been subjected to cross-examination

in open court, it will be necessary for evidence of the accused's mental condition to be led in his or her presence in order to satisfy the court that the accused should not be hearing such evidence. It is also arguable that the accused's absence from court during the fitness hearing may interfere with his or her ability to advise counsel on the cross-examination of prosecution witnesses. This being the case, it may be challenged as running contrary to the right to make full answer and defence, and as being a violation of s. 7 of the Charter (see also s. 2(e) of the Bill of Rights).

Alternative

Provide that all accused persons have the absolute right to be present in court during the trial of a fitness issue.

Considerations

This alternative may be seen as more logical, and would ensure against the potential Charter attacks referred to above. However, it would also remove the protection to the accused's mental health afforded by s. 577(2)(c).

Issue 10

What provision should be made with respect to the amount of expert evidence (if any) required on the issue of fitness?

Discussion

As has been the case with several of the issues discussed above in the context of both fitness and remand, the issue here is balancing fairness to the accused against expediency. While it is necessary that there be sufficient information on which to base the finding of fitness or unfitness, too stringent a requirement may result in an inability to find an accused unfit in proper circumstances.

There is no provision in the Criminal Code that requires that any expert evidence be produced at any trial of the issue of fitness. Not requiring expert evidence saves time and expense where such evidence is not necessary. Arguably, expert evidence is unnecessary in many cases, and the trier of fact can infer unfitness from the accused's behaviour. If however, the codified criteria

for unfitness are to include "mental disorder," it is arguable that expert evidence may be required. In practice, there is usually psychiatric evidence where this is required. Not requiring expert evidence causes minimum interference with counsel's ability to conduct the case as he or she sees fit.

On the other hand, not requiring expert evidence is inconsistent with the fact that the evidence or report in writing of "at least one duly qualified medical practitioner..." is generally necessary at present for mere remand. Not requiring expert evidence is also inconsistent with s. 690 of the Code, which requires inter alia that on the hearing of a dangerous offender application, "the court shall hear the evidence of at least two psychiatrists..." and makes elaborate provision for the nomination of such psychiatrists. Moreover, not requiring expert evidence may create a danger that persons will be improperly found unfit and detained.

Alternative I

Require that on any trial of the fitness issue the court shall hear the evidence of at least two psychiatrists, one of whom shall be nominated by the prosecution and one of whom shall be nominated by the defence.

Considerations

Such a provision would be consistent with current normal practice and would also be consistent with the provisions of s. 690 of the Code. This approach would guard against improper findings of unfitness and consequent deprivation of liberty.

Such a provision may, however, be unnecessary in light of current normal practices. Arguably, moreover, such a provision may elevate the stature of psychiatric evidence beyond that which is appropriate. The question of fitness to stand trial is not necessarily either beyond the competence of a lay trier of fact or exclusively within the psychiatrist's field of expertise. (The validity and reliability of psychiatric diagnosis and its relevance to the question of fitness is being questioned generally). This approach would also be more costly.

Alternative II

Require the evidence of a specified number of psychiatrists in support of any finding of unfitness (Butler Committee).

Considerations

This approach goes a step beyond that described in Alternative I; under Alternative I, although the evidence of a specified number of psychiatrists is required, there is no requirement as to what their opinions must be before a finding of unfitness can be made.

Under this alternative, the opinion of one psychiatrist plus the surrounding circumstances may be sufficient evidence in many cases. If evidence of more than one psychiatrist is required in support of any finding of unfitness, however, this approach may interfere with the present right of the jury to accept the evidence of one expert and reject that of another.

Alternative III

Require that the court shall hear the evidence of a panel of court-appointed psychiatrists and/or mental health professionals.

Considerations

This alternative would eliminate the practice of "psychiatrist shopping," and might therefore result in uniform and unbiased expert evidence. It might, of course, be argued that this approach might only achieve the illusion of impartiality, which may be more dangerous than obvious partiality. This option allows for qualified persons (appointed by the court) other than psychiatrists to give evidence.

Alternative IV

Same as Alternative I, II or III, but provide that the court shall receive a report instead of hearing oral evidence, and permit either side, with leave of the court, to require the attendance of experts for the purpose of cross-examination.

Considerations

The chief advantage of this approach is expediency. The chief disadvantage lies in the fact that the reports may contain prejudicial material, and may not in themselves be subject to cross-examination unless the courts grant leave.

Alternative V

Same as Alternative IV, but give both sides the absolute right to require the attendance of experts for the purpose of cross-examination.

Considerations

This approach has the same advantages and disadvantages as Alternative IV, with one exception: here cross-examination becomes an absolute right.

Issue 11

What provision should be made with regard to burden of proof when the issue of fitness is raised at first instance?

Discussion

Burden and standard of proof were discussed earlier. As mentioned, the issues of burden and standard of proof raise the question of expediency versus fairness to the accused. Once again, there is the interest in minimizing delay; a fair trial may require that persons who are in fact unfit should be found unfit, and that burden and standard of proof should not impose an undue impediment to such finding. On the other hand, fairness to the accused may dictate that explicit and stringent requirements be enacted with regard to burden and standard of proof. Burden and standard of proof will, in theory, govern the ease with which a finding of unfitness can be made.

While the Code provides in s. 16(4) that "Everyone shall, until the contrary is proved, be presumed to be and to have been sane" (emphasis added), it is unclear whether this section applies only with respect to the defence of insanity or with respect to the question of fitness to stand trial as well. The case law is unclear and conflicting on the issue of who bears the burden of proof, and what the standard is at first instance.

Alternative I

Provide that the burden of proving unfitness rests on the party that raises the issue.

Considerations

This approach is a simple application of the maxim "he who alleges must prove." It is consistent with that taken with respect to the defence of insanity and the presumption of sanity (at least for the purposes of the defence of insanity) contained in s. 16(4) of the Code. This approach, which has the effect of articulating a presumption of fitness, may be seen as fair, having regard to the fact that a finding of unfitness may result in indefinite confinement. Arguably, however, this alternative is inconsistent with the right of unfit accused persons not to be tried (see s. 2(e) of the Bill of Rights, and s. 7 of the Charter); perhaps it is unfair to require an unfit accused person to prove unfitness.

Alternative II

Provide that once one party raises the issue of unfitness, the burden of proving fitness rests on the other party.

Considerations

While this approach would protect the right of accused persons not to be tried while unfit, it comes very close to creating an illogical presumption of unfitness. Furthermore, fitness may be difficult to prove.

Alternative III

Provide that regardless of who raises the issue, "Where there is a real issue, on the ground of insanity, as to the fitness of an accused to stand trial, the prosecution has the legal burden of satisfying the court...that the accused is fit to stand his trial" (Bill S-33,s. 13).

Considerations

This approach is consistent with the fact that under present law the court can apparently raise the issue of fitness itself. According to Professor Allan Manson:

"support for the argument that the burden must always rest with the Crown lies in the recognition that any participant, including the Court of its own motion, may raise the issue of fitness. If concern that the accused may be unfit emanates solely from the Court itself, surely it is the Crown which must satisfy the trier of the issue that the accused is fit if the prosecution which the Crown has initiated and over which the Crown has conduct is to proceed." This approach is consistent with the general rule in Woolmington v. D.P.P. and Crane v. D.P.P., although it is inconsistent with the M'Naghten "exception" to the general rule in Woolmington (i.e., the "exception" that applies to the defence of insanity). It may be argued that such an approach is illogical insofar as it virtually creates a presumption of unfitness.

Alternative IV

Provide that burden of proof rests with no one.

Considerations

This approach derives from and is consistent with the concept in some English and Canadian cases that the question of fitness is "strictly an inquiry on behalf of the Queen to determine the status of the subject and not a trial involving adversaries to determine whether an offence has been committed...." It is also consistent with the right of the accused not to be tried while unfit (see s. 2(e) of the Bill of Rights and s. 7 of the Charter), and with the present apparent power of the court to raise the fitness issue of its own motion.

On the other hand, this approach runs contrary to the general rule that "he who alleges must prove." It runs contrary to the prevailing law, and has either not been followed or has been expressly rejected by a number of Canadian courts. Furthermore, this approach is inconsistent with the law regarding the onus of proving insanity for the purpose of s. 16 of the Code (where there also exists an absolute right not to be convicted of a crime committed while insane). By s. 16(4) of the Code there is a presumption of sanity, at least for the purposes of the defence of insanity. Insofar as a finding of unfitness may result in deprivation of liberty for an indefinite period, it is arguable that there should be a presumption of fitness just as there is a presumption of innocence.

Issue 12

What provision should be made with regard to burden of proof when a person previously found unfit is returned for trial?

Discussion

Currently, persons are only returned for trial once the lieutenant governor of the province determines that they are fit. It is therefore arguable that there should be a presumption of fitness. On the other hand, it is arguable that once a person has been found unfit he or she should be presumed unfit upon return for trial, unless and until the court determines otherwise.

The Code makes no provision in this regard, and there is unclear and conflicting case law.

Alternative I

Provide that the burden of proving unfitness rests on the party that raises the issue.

Considerations

Under this alternative there would not be a new fitness hearing unless the issue were raised again. This approach, which has been advocated in at least one recent Canadian case, is consistent with the fact that the issue is present fitness. It is also consistent with Criminal Code provisions requiring the issue to be tried only where sufficient reason to doubt fitness appears to the trial judge. Arguably, however, a previous finding of unfitness should create a presumption of unfitness when the accused is returned for trial.

Alternative II

Provide that the accused is presumed to be unfit and that the burden of proving fitness rests on the prosecution.

Considerations

Under this alternative, the fitness issue would be automatically tried upon the accused's return to trial. This approach has support in several Canadian and English cases and is consistent with the fact that there has been

a previous verdict on this issue and that the only evidence that the findings of fact on which it was based are no longer correct (i.e., the opinion of the lieutenant governor and/or the board of review) has not been adduced in court or subjected to any kind of scrutiny, cross-examination, etc. Arguably, however, this approach is inconsistent with the Code's current provisions which state that the trial judge need only direct the trial of fitness issue where sufficient reason to doubt fitness appears. In effect, it removes the trial judge's discretion and makes a fitness hearing mandatory every time a previously unfit accused is returned for trial.

While the presumption of unfitness would give due weight to the previous finding of unfitness, the effect of this alternative would be to require fitness to be tried whenever previously unfit accused persons are returned for trial. This would be redundant where the return for trial has resulted from a proper review procedure. In addition, there would be the problem as to what to do with the accused if the presumption is not rebutted (see below).

Alternative III

Provide that the accused is presumed to be unfit and the burden of proving fitness rests on the defence.

Considerations

Such a provision would be a strong safeguard for the accused's right not to be tried while unfit, and would give due weight to the previous finding of unfitness. It may be argued, on the other hand, that it is not logical for there to exist a presumption of unfitness, considering that (under present law and practice at least) the accused is only returned to court once he or she has been assessed as fit by the lieutenant governor (with the help of a board of review and psychiatric experts). If the presumption is not rebutted, then what? Should the accused be sent back for treatment by psychiatrists who, by releasing him or her, have already made clear their position that the accused is fit and does not need treatment to become fit? Perhaps the answer to this question lies in the fact that the issue is not a psychiatric one but a legal one.

Alternative IV

Provide that "Where there is a real issue, on the ground of insanity, as to the fitness of an accused to stand

trial, the prosecution has the legal burden of satisfying the court... that the accused is fit to stand his trial" (Bill S-33, s. 13).

Considerations

This approach would avoid the problems of presumptions and automatic fitness hearings discussed above. It would also be a strong safeguard for the right of the accused not to be tried while unfit.

Issue 13

What provision should be made with regard to standard of proof if and when the burden is on the defence to prove fitness?

Discussion

As mentioned earlier, the standard of proof will govern the ease with which a finding of fitness or unfitness can be made. Currently, the Code makes no provision in this regard.

Alternative I

Require proof on a balance of probabilities.

Considerations

This standard would protect the accused's right not to be tried while unfit (see s.2(e) of the Bill of Rights and s.7 of the Charter). Arguably, however, this approach would be inconsistent with s.7 of the Charter insofar as it would require the accused to prove fitness by a fairly high standard in order to avoid detention for treatment. It might constitute a deprivation of liberty otherwise than "in accordance with the principles of fundamental justice."

Alternative II

Require the raising of a reasonable doubt as to unfitness.

Considerations

This is a lower standard than that under Alternative I. While this approach gives utmost consideration to the right to be tried, it may give insufficient consideration to the right not to be tried while unfit (see s. 2(e) of the Bill of Rights, and s. 7 of the Charter).

Issue 14

What provision should be made with regard to standard of proof if and when the burden is on the prosecution to prove fitness?

Discussion

The discussion for Issue 13 applies here. Again, the Code makes no provision with regard to standard of proof if and when the burden is on the prosecution to prove fitness.

Alternative I

Require proof beyond a reasonable doubt.

Considerations

This is the ordinary burden that rests on the Crown in criminal cases with regard to proof of guilt. This standard is particularly appropriate where the defence raises the issue of unfitness. As Manson has argued: "The...situation, where the accused asserts unfitness and is challenged by the Crown, represents a substantial conflict between the parties, the resolution of which determines whether the accused will be subjected to the risk of criminal sanctions. Hence, there appears to be no reason why this conflict, cast in an adversarial setting, should not also be subjected to proof by the Crown beyond reasonable doubt." This standard is also consistent with the accused's right not to be tried while unfit (see s. 2(e) of the Bill of Rights and s. 7 of the Charter).

On the other hand, it may be argued that this standard effectively places the presumption of unfitness on the same plateau as the presumption of innocence. This situation might be seen by some as absurd. Furthermore, this standard might be seen as placing an unreasonable burden on the Crown, particularly since the accused may frustrate the Crown's efforts to prove fitness by refusing to undergo examination.

Alternative II

Require proof on a balance of probabilities (Bill S-33, s. 13).

Considerations

This approach has been taken in some Canadian cases. Arguably, it does not place an unreasonable burden on the Crown. This standard is, however, inconsistent with the burden that normally rests on the Crown in criminal cases regarding proof of guilt.

Issue 15

What provision should be made with regard to standard of proof if and when the burden is on the defence to prove unfitness?

Discussion

Similar considerations to those discussed for the above two issues apply here as well.

Again, the Code makes no provision with regard to the standard of proof if and when the burden is on the defence to prove unfitness.

Alternative I

Require proof on a balance of probabilities.

Considerations

This approach would be consistent with the present quantum of proof required for the defence of insanity (according to Canadian case law), and would also be consistent with a reasonable presumption of present sanity.

Alternative II

Require the raising of a reasonable doubt as to fitness.

Considerations

While this approach would constitute a strong safeguard against the trial of unfit persons in that very little would be required of possibly unfit accused persons to establish their unfitness, it would considerably weaken any presumption of present sanity that may exist. This standard is also inconsistent with the present standard of proof required for the defence of insanity (i.e., balance of probabilities), and makes trial of the issue somewhat redundant if the test for whether a trial of the issue should be directed remains the same as it currently is. Under this alternative the prosecution would be placed in a difficult position as far as rebuttal is concerned.

Issue 16

What provision should be made with regard to the standard of proof if and when the burden is on the prosecution to prove unfitness?

Discussion

Similar considerations to those discussed for Issue 13 apply here as well. Note that the Code makes no provision with regard to the standard of proof if and when the burden is on the prosecution to prove unfitness.

Alternative I

Require proof beyond a reasonable doubt.

Considerations

It may be argued that this standard is demanded by the seriousness of the consequences of a finding of unfitness under the present law. As Professor Manson has forcefully argued: "it is essential to note that when the Crown asserts unfitness in Canada, it constitutes an attempt by the state to deprive the citizen of liberty.... The citizen, albeit an accused within the criminal process, has not been found guilty. He has a constitutionally protected right to be presumed innocent and not to be deprived of his liberty except 'in accordance with the principles of fundamental justice'. Surely, the state must carry a substantial burden before it is entitled to commit him."

If, however, the law is changed so that indefinite detention is not as likely to follow a finding of unfitness, this rigorous standard may not be necessary. It may be argued, in any event, that this standard may not sufficiently protect the right of the unfit accused not to be tried.

Alternative II

Require proof on a balance of probabilities.

Considerations

This approach would be consistent with the present judicial view regarding the quantum of proof required for the defence of insanity when raised by the Crown, and would be consistent with a reasonable presumption of present sanity.

This standard would, however, be inconsistent with the usual standard of proof on the Crown in criminal cases, and might tempt prosecutors to prove unfitness by this lower standard rather than prove the accused guilty of the offence charged (assuming that postponement of the issue is not mandatory).

Chapter 4

THE DEFENCE OF INSANITY

THE DEFENCE OF INSANITY

INTRODUCTION

How ought the law respond to crimes committed by "insane," or partially "insane" persons? This question has plagued Canadian criminal law from its beginning, partly because of our difficulty in reconciling certain competing values, and partly because of our imperfect understanding of the human mind.

The issue of the proper scope of the insanity defence -- and whether such a defence should even exist -- has been hotly debated for the past 150 years. The longevity of the debate is testimony to its intractability. No obvious solution has emerged. This is not for want of trying; reports, books, articles and judicial decisions on insanity and its reform abound. Yet when all is said and done, we may have to accept the words of the Minister of Justice who, on introducing the insanity defence into our first Criminal Code in 1892, stated that it is "an unsatisfactory solution, still it is the best that can be devised."

In substance, we still have the 1892 insanity defence. The various insanity options that have been tried or recommended since then will be examined in this part in an effort to find the best solution for today's world. But first a preliminary question will be addressed.

Does it really matter all that much what the precise scope of the insanity test is? Is there any difference in result in using various insanity tests, or do jurors largely ignore the precise wording of the test and simply apply their own intuitive standards? No definitive answer can be given to these questions, but what evidence there is points to the conclusion that the test is not very relevant to the result. Data indicate, for example, that when the District of Columbia switched from a strict M'Naghten test to a liberal Durham test there was not a significant increase in the percentage of insanity acquittals. What increase there was is more likely attributable to the widening of the scope of admissible psychiatric evidence that accompanied the new test, rather than to the scope of the test itself. As well, the increase in insanity acquittals appears to have come from what previously would have been not guilty verdicts. (Morris, Brakel, and Rock).

Mock jury studies have been conducted using the same trial facts but three different insanity tests -- M'Naghten, Durham, and a "non-test" in which the jury were simply asked if the accused was insane at the time of the act (Simon). The non-test produced the most insanity acquittals, M'Naghten the least, with Durham in between. But the authors of the study concluded that there were no significant differences in the percentage of insanity acquittals, although the difference between M'Naghten and Durham was 12 per cent. Their conclusion is obviously open to dispute.

Other studies indicate that only one-third to one-half of the jurors could accurately recall the judge's instructions on the insanity defence. This is the lowest accuracy recall rate of any material heard during each trial. Such disturbing findings tend to confirm that the precise wording of the insanity defence may not be too relevant in the jury's eventual decision.

A recent New York State study of insanity acquittees suggests that the particular language of the insanity test is not the deciding factor. Other variables (e.g., the type of person; the type of crime, the idiosyncrasies of attorneys, prosecutors and judges in particular counties; and the proximity of available facilities) would appear to be more relevant (Petrila).

In a recent Missouri study, the authors concluded that the words of the insanity test were not very important to psychiatrists' clinical opinions on whether the accused was legally insane, although the psychiatrists' clinical opinions were highly relevant to the insanity decision. Factors which appeared more important included: prior criminal history, prior mental illness, psychiatric diagnosis, the nature of the offence, and the relationship of the offender to the victim (Petrila).

Quinsey contends that perceived suitability for treatment is a significant factor in the insanity decision. He suggests that "the psychiatrists' perceptions of suitability for a mental hospital or some amalgam of the offender's stated interest in treatment, his attractiveness, his previous stays in hospital, the flagrancy of his psychopathological symptoms, and the bizarreness of his offence."

In addition to all of the above factors, it is arguable that the matter of disposition may be far more important to the jury than the exact words of the insanity test. The jury's decision may depend in large part on their perception of what will happen to the accused.

Having a test gives us a sense that we do know what we are doing. But (according to Wexler) the truth is "that we cannot now, and may never be able to make consistent, rational judgments in this terrible area." Thus, by Wexler's reasoning, our insanity tests are "secretly ratifying discretion without limiting or guiding it." The data listed above tend to support Wexler's thesis.

The attitude of individual jurors to psychiatry in general has been shown to affect outcome. Hostility by jurors to psychiatry may reduce the chances of succeeding on an insanity defence.

Available data indicate that the insanity defence is not successfully raised very frequently. When it is successful, the language and scope of the test do not seem to be very significant to the ultimate outcome. Is not then all the debate on the insanity test little more than a tempest in a teapot? In the above two senses, the answer would appear to be yes. But although practically insignificant, the insanity test is theoretically quite significant since it is integrally related to the criminal law's theory of responsibility and punishment. That theory posits that man generally has the capacity to reason right from wrong and the capacity to choose good or evil. Packer has aptly, if not cynically, described the connection between this theory and the insanity defence:

> "We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will. The criminal sanction, as I have pointed out before, does not rest on an assertion that human conduct <u>is</u> a matter of free choice; that philosophic controversy is irrelevant. In order to serve purposes far more significant than even the prevention of socially undesirable behaviour, the criminal sanction operates <u>as if</u> human beings have free choice. This contingent and instrumental posit of freedom is what is crucially at stake in the insanity defense. There must be some recognition of the generally held assumption that some people are, by reason of mental illness, significantly impaired in their volitional capacity. Again, it is not too important whether this is in fact the case. Nor is it too important how discriminating we are about drawing some kind of line to separate those suffering

> volitional impairment from the rest of us. The point is that some kind of line must be drawn in the face of our intuition, however wrongheaded it may be, that mental illness contributes to volitional impairment."

If the data and assertions described above are accepted, it is fair to conclude that the precise scope of the insanity test is largely insignificant on the practical level, yet quite important on the theoretical, philosophical or ethical level.

This portion of the paper will deal chiefly with the substantive question of what insanity test, if any, our Criminal Code ought to adopt. It will then go on to deal with several procedural and evidentiary issues inherent in the administration of any insanity defence.

ISSUES

Issue 1

Should insanity (i.e, mental disorder in some form) be a separate defence in criminal law?

Discussion

Many eminent jurors and legal scholars have advocated abolition of the insanity defence. Their reasons, which are both practical and theoretical, are not uniform. They do not necessarily share a common perception of how mental disorder in the criminal process should operate in the event that the insanity defence were abolished. For this reason it is difficult to treat "abolition" as only one option. It has several variations.

Alternative I

Abolish the notions of blame, criminal responsibility and insanity (the Wootton proposal).

Considerations

Under this alternative, the only question at trial would be whether the accused committed the actus reus (i.e, the prohibited act). Mental state would be relevant only at the dispositional stage.

This approach would avoid the possibly unrealistic division of conduct between mad and bad, would avoid "hairsplitting about the limits of mental abnormality" (Wootton), and would avoid the vagueness, the semantic jousting and the heavy reliance on experts which now characterize the insanity defence. It would, in fact, avoid all of the other criticisms that have been raised against the insanity defence.

Abolition of the insanity defence might, however, have a number of disadvantages. It is arguable, for example, that removal of responsibility and the insanity defence threatens respect for individuals (Fingarette); persons become mere objects to be treated, rather than autonomous, responsible agents. Abolition removes the "vitally important distinction between illness and evil" (Goldstein), the distinction which in dramatic trials reminds all the rest of us that we are in general responsible for our conduct. Conviction of the irrational, insane person who has no capacity to control his or her conduct or to know that it is wrong, may be seen as morally wrong, unfair, and cruel and unusual (Goldstein). It is arguable that to abolish the insanity defence is "to deprive the criminal law of its chief paradigm of free will" (Packer). H.L.A. Hart has pointed out that this option has the further disadvantage of subjecting to possible treatment persons who are neither blameworthy nor mentally ill. He has noted "To show that you have struck or wounded another unintentionally or without negligence would not save you from conviction and liability to such treatment, penal or therapeutic, as the court might deem advisable on evidence of your mental state and character."

Alternative II

Abolish the insanity defence but allow evidence of mental disorder to negate an essential element of the crime (i.e., mens rea or actus reus) (Idaho, Montana, proposed U.S. Federal Criminal Code).

Considerations

This approach was recommended some 20 years ago by Professors Goldstein and Katz, who pointed out that mental illness sufficient to constitute an insanity defence under the M'Naghten test would also be sufficent to vitiate mens rea, and that there may therefore be no need for a separate defence. The approach is consistent with the main principles of criminal law involving mens rea and actus reus, and does

away with the very difficult task of formulating a separate insanity defence. It would likely reduce, though not eliminate, the frequency with which criminal trials become battles between psychiatrists.

This approach, however, has some theoretical disadvantages. To begin with, it must be pointed out that the defence of insanity is wider than the concept of mens rea. This being so, abolition of the insanity defence would result in the conviction of some mentally disordered persons who have mens rea, but no rational mens rea. Arguably, this is neither fair nor just to the accused, nor beneficial to society's perception of the criminal justice system. From a practical standpoint, abolition of the insanity defence and its special verdict may result in an outright acquittal on the basis of no mens rea for some persons who are likely to commit further serious offences. Psychiatric evidence restricted to the mens rea issues of intent, knowledge or recklessness would arguably not give a clear or full picture of the extent of an accused's total impairment and therefore his capacity to act rationally. In attempting to acquit the truly insane, courts may be forced to stretch or twist the concept of mens rea in a manner that creates confusion or inconsistency.

Issue 2

Assuming there is to be a separate defence of insanity, what should the test for insanity be?

Discussion

Our current test for insanity is contained in s. 16 of the Criminal Code, which provides in part as follows:

> "16. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.
>
> (2) For the 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."

"Disease of the mind" is a legal concept and has now been given a very wide definition by the Supreme Court of Canada. "Appreciating" has a broader meaning than "knowing"; appreciating the nature and quality of an act or omission includes a real understanding of its physical consequences. "Wrong" means legally wrong, not morally wrong.

The current test has been used for 100 years and seems reasonably capable of application by judges, juries and experts. The key words in the test ("know," "appreciate," "disease" and "wrong") have all been recently and authoritatively interpreted. The criteria in the test are reasonably susceptible to a layman's interpretation, and therefore do not totally remove the issue from the jury and place it in the hands of experts.

Despite these considerations, s. 16 may be seen as having a number of drawbacks. It does not, for example, include impairment of volition as a basis for insanity and may not include impairment of emotional processes, except to the extent that either impair the cognitive requirements of the test.

The interpretation of the word "wrong" as legally wrong, moreover, may exclude from the insanity defence some persons who are severely mentally disordered but who know what they are doing and know that it is against the law. The expressions "natural imbecility," "disease of the mind" and "insanity" are archaic expressions which are no longer in use in the medical world. Furthermore, while it is unclear whether the incapacity in the test must be total, s. 16 provides for only two options: full responsibility, and total lack of responsibility. This black and white approach does not recognize gradations of responsibility.

In light of the above arguments, it may be argued that s. 16 should be overhauled at a minimum (a) to remove the archaic language, (b) to insert an exemption to

cover lack of knowledge of moral wrongfulness, (c) to recognize emotional impairment and (d) to recognize volitional impairment. One disadvantage to expanding the insanity defence is that it could result in public and political criticism if an increase in the number or type of insanity acquittals were to result. Arguably, however, such concerns would be more closely linked with the disposition resulting from an insanity acquittal than with the actual test used.

Alternative I

Provide that "to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong." Provide also that an accused who "labours under partial delusion only, and is not in other respects insane... must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real" (M'Naghten rules).

Considerations

This is perhaps the strictest test and, as such, it reduces the possibility of "too many" persons being found insane (which might erode public confidence in law enforcement). It uses words that are not defined in reference to the medical knowledge of any particular day, and provides understandable criteria for the jury. The first branch of the test is consistent with the principles of mens rea, while the second branch may be seen as consistent with sound principles of morality.

Note, however, that the test appears to define insanity in terms of cognitive capacity only, and not in terms of impairment of volitional or emotional capacities. This results in excluding some persons from the defence who, it may be argued, morally should not be held criminally responsible. The test may be criticized as representing an obsolete medical view of the personality as compartmentalized into separate functions -- thinking, willing and feeling -- rather than as an integrated whole. It does not recognize degrees of impairment; one either "knows" and is sane, or doesn't "know" and is therefore insane. The word "know" is also more restrictive than the word "appreciate." Repeal of the M'Naghten test has

been advocated widely from both legal and medical quarters. In England, abolition of M'Naghten has been advocated by the Royal Commission on Capital Punishment and by the Committee on Mentally Abnormal Offenders (Butler Committee).

Alternative II

Same as Alternative I (M'Naghten), but provide as well that a person is not responsible if that person had a mental disease that kept him or her from controlling his or her conduct even though he or she knew the nature and quality of his or her act and knew that it was wrong.

Considerations

This test recognizes volitional impairment and is arguably therefore consistent with the moral basis for imposing criminal liability; civilized penal systems do not punish people for what they cannot avoid. It recognizes that aspects of psychodynamics distinct from cognition may be involved in behaviour. The test has been adopted in a large number of American, Australian and South African jurisdictions. It was also recommended for adoption in England by Lord Atkin's Committee on Insanity and Crime.

This test may, however, be criticized on the ground that it may be impossible to distinguish an "irresistible" impulse from an impulse that has simply not been resisted.

Alternative III

Provide that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." Define "disease" as "a condition which is considered capable of either improving or deteriorating," and define "defect" as "a condition which is not considered capable of improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease" (Durham v. U.S.).

Considerations

This test is premised on the notion that the mind functions as an integrated whole, and that the functions of cognition and control cannot be properly separated;

it is therefore futile to attempt to identify types of malfunctioning symptoms which do not necessarily accompany even the most serious mental disorders. It is arguable that this test broadens the scope of non-responsibility for crime due to mental illness in a manner that is more consistent with the clinical realities of mental illness than are other insanity tests. It is a fairly simple test which gives the jury a wide latitude and may allow for greater flexibility and scope in psychiatric evidence.

There are, however, some major disadvantages to this test. It may, first of all, be considered a "non-rule," since it does not direct the jury to the factors or symptoms that are relevant to the law in determining criminal responsibility. The result may be undue reliance on expert opinion; the function of the jury may be usurped by experts. Leaving the issue of responsibility to the jury without any guidelines may also be undesirable, since it will inevitably result in lack of uniformity and equality in decisions.

Alternative IV

Provide that "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." Provide as well that "the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct" (ALI Model Penal Code, s. 4.01).

Considerations

Professor Abraham Goldstein has described some advantages of the ALI test as follows:

> "This test is a modernized and much improved rendition of M'Naghten and the 'control' tests. It substitutes 'appreciate' for 'know,' thereby indicating a preference for the view that a sane offender must be emotionally as well as intellectually aware of the significance of his conduct. And it uses the word 'conform' instead of 'control,' while avoiding any reference to the misleading words 'irresistible impulse.' In addition, it requires only 'substantial'

> incapacity, thereby eliminating the occasional reference in the older cases to 'complete' or 'total' destruction of the normal capacity of the defendant."

According to the United States' Fourth Circuit Court of Appeals in United States v. Chandler;

> "With appropriate balance between cognition and volition, it demands an unrestricted inquiry into the whole personality of the defendant.... Its verbiage is understandable by psychiatrists; it imposes no limitation upon their testimony, and yet, to a substantial extent, it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply."

This test may be seen as a compromise between the strictness of M'Naghten (Alternative I) and the unstructured nature of Durham (Alternative III). As of 1980, twenty-eight states and 10 out of 11 federal circuit courts had adopted in substance the ALI test as the best and most functional insanity test.

On the other hand, several criticisms may be levelled at this approach. It may, for example, be argued that the words "substantial" and "appreciate" are too vague.

The test of "conformity," moreover, may suffer from the same problem as the "irresistible impulse" test: how is the jury to distinguish between incapacity to conform and wilful or reckless failure to conform? It may be argued that the words "as a result of" are subject to the same causality difficulties inherent in the "product of" formulation in Alternative III (i.e., Durham).

Alternative V

Provide that an accused "is not responsible if at the time of his unlawful conduct his mental or emotional processes or behaviour controls were impaired to such an extent that he cannot justly be held responsible for his act" (U.S. v. Brawner, per Bazelon J.).

Considerations

This test emphasizes that it is the jury's function to make the ultimate decision on insanity, and discourages

encroachment on this issue by experts. It may, however, be criticized as being a "non-test," since it does not direct the jury to the factors or symptoms that are relevant to the law in determining criminal responsibility. Leaving the issue of responsibility to the jury without such guidelines may result in arbitrary or unequal decisions in which each jury formulates its own legal rule and standard of justice.

Alternative VI

Provide for the availability of a mental disorder defence in circumstances where there is either: (1) mental disorder negating mens rea (i.e., intention, foresight, knowledge, etc.); or (2) severe mental disorder or severe subnormality, notwithstanding technical proof of mens rea (Butler Committee).

Considerations

This test does away with the archaic word "insanity" (as does the Committee's recommended verdict, "not guilty on evidence of mental disorder"). It amalgamates the currently separate defences of "insanity" and "mental disorder short of insanity negating mens rea"; both become subject to the special verdict and give the courts a new and wide-ranging power of disposal which they would not have under an ordinary acquittal. The test avoids the narrowness of M'Naghten and its arguably obsolete belief in the pre-eminent role of reason in controlling human behaviour, recognizing that persons can know what they are doing yet be so severely disturbed in intellectual, emotional or control functions as not to be justly responsible for their conduct. Furthermore, the test avoids the "product" or causation problem of the Durham test (Alternative III, supra) by presuming causation in cases of severe mental illness. Unlike Durham, it defines "severe mental illness" and gives it a detailed, symptom-oriented definition. Finally, this test avoids the difficulty of the ALI test (Alternative IV, supra) of distinguishing between non-conformity and incapacity to conform.

The drawbacks to this approach may, however, be numerous. First, by doing away with causation, the test leaves open the possibility (slight as it may be) that a person will be exempt from liability for an offence that in no way was caused by or attributable to his or her severe mental disorder. Second, the first branch of the test calls for psychiatrists to testify as to whether a mental disorder negated mens rea at the time of the

offence. This involves reconstructive speculation, at which psychiatrists may be no more expert than a jury. Third, the second branch of the test, according to the Butler Committee, "necessarily turns over the test of criminal responsibility to medical opinion." Fourth, combining the "insanity" defence with the defence of "mental disorder short of insanity negating mens rea" may be undesirable. Under current law, the latter defence will normally reduce a charge from one level to a lower level (e.g., first degree murder to second degree murder or manslaughter); but at least there is a conviction on the lesser charge, since the court is of the opinion that the accused had the mens rea for the lesser offence. Under the Butler test, however, the accused is acquitted (and cannot be tried on the lesser charge) without any inquiry into whether he had the requisite mens rea for a lesser offence.

Alternative VII

Provide that "Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he was incapable of appreciating the nature, consequences or unlawfulness of such conduct" (Law Reform Commission of Canada, Alternative Test #1).

Considerations

According to the Law Reform Commission, this alternative is designed to retain the substance of the current s. 16 insanity defence, subject to a tidying up of the legislative drafting.

Alternative VIII

Provide that "Every one is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law" (Law Reform Commission of Canada, Alternative Test #2).

Considerations

This test uses clearer, more precise (and of course wider) language than the present insanity test. It

relies on the same key words that have already been authoritatively interpreted ("disease of the mind" and "appreciate") in our existing insanity test. It widens the test (i.e., by including volitional impairment and lack of appreciation of moral wrongfulness) in a way that is not radically new in approach(see Durham, Bazelon J. in Brawner, and the Butler Committee approach, supra) and is therefore likely to cause less confusion and uncertainty in its implementation than one of the more radically different tests.

By using the words "substantial capacity... to conform to the requirements of the law," this test recognizes that behaviour has not only a cognitive but also a volitional component, and may therefore be more consistent with modern insights into human behaviour than the M'Naghten test and the current provisions of s. 16. This recognition of impairment of self-control is also consistent with the current defences of provocation and mental disorder short of insanity negating mens rea. Most importantly, this extension of the insanity defence is consistent with a fundamental moral principle that those who cannot control their actions through no fault of their own should not be held responsible or be punished. This provision would not open the insanity defence to all psychopaths. Those who simply lack feelings of guilt, remorse or concern for others would still be liable to conviction. Those who have a disease of the mind resulting in substantial incapacity to control their conduct would be able to rely on the insanity defence. (At least some of this group are also insane under the current law because they do not "appreciate" their conduct; others are successful in having the charge reduced by pleading no mens rea due to mental disorder short of insanity). In addition, this formulation avoids a major criticism of the "irresistible impulse" test: i.e., that it implies that the conduct must be sudden, unplanned and spontaneous.

Note also that the word "substantial" broadens the insanity test in a way that takes into account the reality that capacity or incapacity is seldom absolute. It also acknowledges that incapacity that is substantial should be adequate to relieve the accused from criminal liability, and recognizes that the question of substantiality is a normative one to be left to the jury.

Use of the expression "moral wrongfulness" may give a broader scope to the insanity defence than it has at present. (Unless this provision were expanded to include legal wrongfulness as well, however, this test may exclude some people to whom the current test would

apply). The arguments for expanding "wrong" to include "morally wrong" were set out and expressly adopted by the McRuer Report in 1956 and by Dickson J. in his dissenting judgment in Schwartz. The Law Reform Commission of Canada gave the following reasons in favour of the use of "morally 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. Third, while it may be undesirable to acquit someone aware that his act was illegal but reckoning it justifiable on his own view of morality, it would be equally undesirable to acquit someone aware that his act was morally wrong but unaware, due to disease of mind, that it was illegal.
>
> 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."

Deletion of the "specific delusions" portion of our current insanity test (i.e., s. 16(3)) accords with the view, shared by the McRuer Commission and the Law Reform Commission of Canada, that there are no instances in which a s. 16(3) case would not be covered by the current insanity test in s. 16(2).

The above test may, however, be subject to several grounds of criticism. To begin with, the "incapacity to conform" clause may raise a distinction that the jury cannot possibly discern. How, it may be argued, is the jury to distinguish between incapacity to conform and wilful failure to conform when all the jury has before it is proof that there was in fact no conformity? In

addition, it may be argued that recognition of impaired volition would weaken society's expectation that those who can reason right from wrong are expected to struggle with their own powers of self-control and to resist temptations to break the law. There may also be fears that such recognition would allow psychopaths to escape conviction too easily, or that it would lead to more domination of the insanity issue by the experts, rather than by the jury. It may also be argued that the "incapacity to conform" test is unnecessary on the ground that the present insanity defence already includes true cases of irresistible impulse caused by disease of the mind.

It may be argued that the "moral wrongfulness" clause is an unwise extension of the insanity test, since it is vague and subjective, allowing for each individual to follow his or her own morality no matter how bizarre or unnatural. Even if morality is given an objective meaning-- something that the accused knows would be condemned in the eyes of others -- there is still the problem that in Canadian society we do not have a single morality, but a plural morality in regard to many issues. It is also arguable that this clause favours the amoral over the moral. (These arguments are, however, less persuasive if one remembers that the issue only arises if the person's mistaken morality arises from disease of the mind).

Reducing the requirements of the test from full capacity to substantial capacity may be seen as undesirable, since it could allow persons who had at least some capacity to conform to the law to totally escape conviction and punishment.

It may also be argued that the above test is too narrow in one respect. The word "appreciate" may not include any requirement that an accused be aware of the emotional significance of his conduct (Kjeldsen). Arguably, emotional impairment is relevant to the "capacity to conform" branch of the test. It could be argued that total or substantial lack of capacity to appreciate the emotional significance of conduct can be itself a substantial impairment of the ability to control one's behaviour in the same way that persons with ordinary emotional processes can control their behaviour. Therefore, emotional impairment may be relevant under the "capacity to conform" branch of this test.

Alternative IX

Supplement the insanity test with a diminished responsibility test as follows:

(1) Everyone is partially excused from criminal liability for his or her conduct if it is proved that as a result of disease or defect of the mind he or she lacked a substantial or significant capacity either to appreciate the nature, consequences or moral or legal 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.

Considerations

This test is drafted in a manner so as to be consistent with the criteria in the Law Reform Commission of Canada's Alternative Test #2 (Alternative VIII, supra). Since the criteria in the insanity test are wide (i.e., mental disorder has a wide definition, cognitive and volitional impairment are recognized, moral or legal wrongfulness is included), the same criteria should prove ample for a diminished responsibility test. It should be noted that this test, as presently drafted, excludes cultural, social or political disadvantage or impairment unless such factors constitute mental disease or defect. The proposal results in a reduction in the level or 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). If insanity includes "substantial" impairment, then this word would be deleted from this proposal, leaving only "significant" impairment. (It may be noted that the English and German concepts of diminished responsibility use the word "substantial").

This approach has two major advantages. First, it recognizes that the line between sanity and insanity is not black and white, i.e, that there are degrees of sanity and insanity. Second, it recognizes partial responsibility not only by reducing the sentence but by reducing the offence. This point is significant, since the name attributed to an offence inherently indicates the seriousness of such offence and/or the degree of culpability of the person convicted.

There are, however, several possible disadvantages to this approach. To begin with, it would require a rewriting of the Code to provide for gradations of offences. The doctrine of diminished responsibility may also be criticized as weakening the deterrent effect of the criminal law, insofar as it arguably does nothing to encourage those with some, albeit limited, mental capacity to struggle to fully comply with the law. It may further be criticized on the basis that longer (not shorter) sentences are required for mentally disordered offenders.

Issue 3

Once insanity has been raised by the accused, should the accused be required to prove insanity, or should the prosecution be required to prove sanity? By what standard?

Discussion

Everyone is presumed, under the Criminal Code and at common law, to be sane until the contrary is proved. Normally, the accused raises insanity as a defence. If the accused does, he or she must prove it on a balance of probabilities. This is now an exceptional rule; in the case of other defences, excuses or justifications, once some evidence of their existence is before the court, the prosecutor must prove beyond a reasonable doubt that the alleged act occurred in the absence of such a defence or justification. Many commentators have questioned why this general rule does not apply to the insanity defence. Arguably, any change in the burden of proof would produce violent public reaction.

Although the defence of insanity is normally raised by the defence, the issue of insanity, at least in Canada, may be raised by the prosecutor. If it is, the burden is on the prosecutor to prove insanity on a balance of probabilities. If neither the accused nor the Crown is

alleging insanity, but there is evidence of insanity, the judge must still direct the jury that if the evidence establishes insanity on a balance of probabilities, the proper verdict is not guilty by reason of insanity.

Alternative I

Provide that the accused must prove insanity on a balance of probability basis (McRuer Commission (1956); Uniform Law Conference of Canada Task Force (1981); Law Reform Commission of Canada (1982); proposed new Canada Evidence Act (Bill S-33), s. 11(2)).

Considerations

Several arguments may be made in favour of placing the burden of proving insanity on the accused when he or she raises it. To begin with, it may be argued that since insanity may be easily claimed, the accused should be required to demonstrate that it is genuine. This proposition may, however, be attacked by three separate lines of reasoning. First, one might ask, if close clinical examination cannot weed out the malingerers or fabricators, can we really expect that the burden of proof will accomplish this purpose? Second, no claim of insanity, even one supported by psychiatric diagnosis, is invulnerable. In many cases, psychiatrists testify that an accused was insane at the time of the offence but the judge or jury rejects that opinion because lay evidence of external realities (i.e., what the accused said and did, how he or she looked, how he or she acted) before, during and after the offence, are inconsistent with a finding of insanity. Third, proof of mens rea (i.e., intent, knowledge, recklessness, etc.) also involves drawing inferences about internal, subjective states that might be feigned. But that difficulty has never caused us to shift the burden to the accused to prove mens rea. Likewise, it may be argued, there is no justification to place the burden on the accused to prove insanity simply because it involves drawing inferences about an internal, subjective state.

A main policy reason that is often put forward for allocating the burden of proving insanity to the accused is the fear that a reasonable doubt about an accused's sanity, and therefore his or her criminal responsibility, can be too easily created, especially in light of the imprecise and often conflicting nature of psychiatric evidence. Some might say, however, that

this argument underestimates the boundaries of the "reasonable doubt" standard and the difficulties that an accused can have in raising evidence of a reasonable doubt. We have sampled the reported cases during the past year from those jurisdictions where the burden is on the prosecutor to prove sanity beyond a reasonable doubt. Almost all of these cases involved at least some expert opinion evidence supporting the accused's plea of insanity. But this evidence was not enough to raise a reasonable doubt. In 28 of the 30 cases, the plea of insanity failed. If anything, these figures suggest that the standard of reasonable doubt is too hard to meet, not too easy.

There is very little empirical evidence indicating the frequency with which the insanity plea is raised and the number of times it succeeds when raised. The data that do exist indicate that the number of insanity acquittals is only a fraction of 1% of the total number of indictable or felony convictions (Pasework and McIntyre). There is nothing in the data to indicate that placing a "beyond a reasonable doubt" burden on the prosecution causes a significant rise in the number of successful insanity pleas.

Another argument that may be made is that proving sanity is impossible. This argument is in many respects similar to the previous argument and needs little additional refutation. The major point behind this argument is that in our society we have not agreed upon what it means to be sane. In addition, sanity implies that there is nothing wrong with an individual. Therefore, it is impossible to require the prosecutor to prove beyond a reasonable doubt such an indefinite, boundless, concept.

This argument may be misleading. It may be an unfair representation to suggest that the prosecutor must prove sanity in the above-mentioned sense beyond a reasonable doubt. The medical, social or metaphysical notion of sanity is not what must be proved. The current legal definition of sanity is confined specifically to the capacity to appreciate the nature and quality of an act or omission or to know that it is wrong.

The major argument against placing the burden of proving insanity on a balance of probabilities on the accused is that it may contradict the fundamental rule requiring the prosecution to prove all the elements of the offence. Where, for example, the accused raises a reasonable doubt as to whether he or she suffered from a disease of the mind that rendered him or her incapable

of appreciating the nature and quality of an act or omission that constituted the actus reus of the offence, there may be reasonable doubt as to whether the accused had the requisite mens rea for the offence. In this case, however, it has been argued that reasonable doubt of guilt will not be sufficient to acquit the accused. Several scholars have called the current burden theoretically unsound and an historic anomaly. It is likely, moreover, that if s. 16(4) continues to be interpreted as placing the persuasive burden of proof of insanity on the defence, it will be challenged as contrary to the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal...," a right which is enshrined in s. 11(d) of the Charter. In such case, the prosecution may have to show that the onus on the accused is a "reasonable limit" which can be "demonstrably justified in a free and democratic society" (Charter, s. 1). Is it "reasonable" to require the accused to prove insanity on a balance of probabilities when there is already a reasonable doubt about the existence of mens rea due to insanity?

Alternative II

Provide that the accused need only raise a reasonable doubt as to sanity, whereupon the legal burden shifts to the prosecution to prove beyond a reasonable doubt that the accused was not insane (Davis v. United States, English Criminal Law Revision Committee (1972, 1980)).

Considerations

Such a change could be accomplished by amending s. 16(4) of the Criminal Code to read: "Every one shall, until a reasonable doubt is raised, be presumed to have been sane." This option is consistent with the prosecution's legal burden of proving mens rea. Its possible shortcomings may, however, be inferred from the comments under Alternative I.

Alternative III

Provide that the prosecutor must prove mens rea beyond a reasonable doubt but that the accused must prove insanity on a balance of probabilities in cases where the mens rea has been proved (Butler Committee).

Considerations

This approach is consistent with the prosecution's legal burden of proving mens rea, yet has the advantages described for Alternative I. It may, however, confuse juries.

Issue 4

Should the prosecution be allowed to lead evidence of the accused's insanity when the accused has not put his or her mental state in issue and does not want it put in issue?

Discussion

Insanity, when used as an excusing condition for criminal liability, is normally referred to as a "defence." Originally, it was only raised by the accused, and usually only in the most serious of cases since the consequence of a finding of not guilty by reason of insanity was indefinite confinement at the pleasure of the lieutenant governor (and that usually meant for the rest of one's natural life). Today confinement is not mandatory, though it is still resorted to in most cases, and it is still indefinite, though the average stay is actually in terms of years rather than for life.

If the accused raises the issue of insanity, the Crown, of course, has the right to introduce psychiatric evidence to rebut that claim. But the Crown also has the right to introduce evidence to try to prove insanity if the accused puts his or her mental state in issue, for example, by arguing automatism or no mens rea, but denying insanity. This is the law in England as well as Canada. But in England, until the accused puts his or her state of mind in issue, the prosecution is precluded from introducing evidence to establish a "defence" of insanity.

In Canada, if evidence of insanity emerges during the trial, though neither the accused nor the Crown is alleging insanity, the judge must leave the issue of insanity with the jury. The trial judge also has the power to reject a plea of guilty if the Crown contends that the accused was insane at the time of the offence.

The issue addressed in this section is whether the prosecution should be entitled to introduce evidence for the purpose of establishing the insanity "defence" when the accused has not put his or her mental state in issue and does not want it put in issue. This question had not been subject to appellate court examination in Canada until the Ontario Court of Appeal raised it in the case of R. v. Simpson. Since then it has been considered in R. v. Saxell and in R. v. Dickie by the same court.

Alternative I

Provide that the prosecution may lead evidence of the accused's insanity when the accused has not put his or her mental state in issue and does not want it put in issue, but only in accordance with the following rules:

(1) Such evidence may be adduced only with the leave of the presiding judge, who might first see fit to hold a voir dire (R. v. Simpson, R. v. Saxell).

(2) There must be evidence "which would warrant a jury being satisfied beyond a reasonable doubt that the accused committed the act charged with the requisite criminal intent, apart from a condition of insanity" (R. v. Simpson).

(3) The trial judge has a discretion "to exclude evidence of insanity when tendered by the prosecution unless he is satisfied that the evidence of insanity proposed to be tendered is sufficiently substantial that the interest of justice requires that it be adduced" (R. v. Simpson).

(4) The proper test for the judge in exercising his or her discretion to allow the prosecutor to introduce evidence of insanity "is not whether, if advanced by the accused, the evidence would be sufficient to require the defence of insanity to be submitted to the jury by the trial Judge, but whether it is sufficiently substantial and creates such grave question whether the

accused had the capacity to commit the offence that the interest of justice requires it to be adduced" (R. v. Simpson).

(5) "[I]n exercising his discretion whether to permit the Crown to adduce evidence of the insanity of the accused, the Judge ought to have regard to the nature and seriousness of the offence alleged to have been committed and the extent to which the accused may be a danger to the public" (Saxell).

Considerations

Although many rationales may be advanced both for and against the rule permitting the Crown to raise the issue of insanity over the accused's objection, in the end it comes down to choosing between two competing principles. On the one hand, respect for individual autonomy suggests that the accused should be permitted to define his or her own best interests even if that means waiving the benefits of the insanity defence. On the other hand, respect for justice and the institutions administering justice suggests that the morally blameless must not be convicted and punished.

Additional arguments in favour of the rule might centre on public protection (assuming that an insanity verdict continues to result in the possibility of indefinite detention in the case of indictable offences). Although these concerns about public danger are understandable, it may be argued that they are inappropriate at this stage of the proceedings. The criminal trial is properly concerned with a determination of responsibility for the commission of a specific offence at a specific time.

Another argument that may be made is that raising the insanity defence for the accused may be in his or her best interests. There are, however, a number of very good reasons why the accused may not want the insanity defence raised: (1) the accused may prefer the certainty of a fixed sentence to the uncertainty of indefinite confinement under an LGW; (2) the accused may prefer confinement in prison to confinement in a psychiatric facility; (3) the accused may find the stigma of criminality and the label "convict" less damaging than the stigma of insanity and the label "ex-mental patient"; (4) the accused may not want to

jeopardize other defences such as alibi, self-defence or duress with evidence of insanity (this danger will be minimized but not totally eliminated by the Simpson rule); (5) The accused may be opposed to psychiatric treatment and fear its involuntary application to him or her under an LGW (although the requirements for consent and exceptions thereto would still apply); (6) the accused may not want the motives for his or her conduct denigrated by the assertion that they are the product of an insane person (this was the rationale behind Louis Reil's resistance to having the insanity defence raised at his trial).

The English rule precluding the prosecutor from raising the insanity defence if the accused has not placed his or her mental state in issue has been justified, in part, on the basis that it is an essential concomitant of the adversary system.

The Law Reform Commission of Canada has noted that the essential characteristic of the adversary system is that the proceedings should be structured as a dispute between two sides who, in criminal cases, are the Crown and the accused. In the English case of R. v. Price, Lawton J. expressed this division of responsibilities as follows: "Prosecutors prosecute. They do not ask juries to return a verdict of acquittal." He also stated: "If insanity is a defence, it seems to me that [it] is for the defendant and his advisers to decide whether to put it forward."

In order to explain the apparent anomaly of the prosecutor raising the insanity "defence" in what is supposed to be an adversary proceeding, it is sometimes suggested that insanity is not really a "defence." In R. v. Simpson, Martin J.A., in response to this apparent anomaly, suggested that insanity is not really a defence, but rather a matter of capacity to commit the offence. The suggestion is that incapacities are not really defences and may therefore be treated as issues to be raised by the prosecutor or judge as well as the accused.

Alternative II

Provide that the trial judge must accord absolute deference to the accused's decision not to raise the insanity defence if the accused has "voluntarily and intelligently" rejected the insanity defence (Frendak v. United States).

Considerations

This alternative is based: (1) on a recognition of a trend in American judicial decisions to give greater respect to individual rights, including the right of the accused to the choice of his or her own defence; (2) on a recognition that, if the accused "must bear the ultimate consequences of any decision" (Frendak) whether or not to raise the insanity defence, he or she should have the right to make that decision; (3) on the view that the valid reasons for a voluntary and intelligent decision not to raise the insanity defence outweigh some abstract principle of justice; and (4) on the view that imposing the insanity defence will do more harm and less justice than not imposing it.

Issue 5

Assuming the prosecution is allowed to lead evidence of the accused's insanity, what standard of proof should the prosecution be required to satisfy?

Discussion

According to current Canadian case law, insanity must be proved on a balance of probabilities basis regardless of which party raises the issue. Should this state of affairs remain the same?

Alternative I

Require proof on a balance of probabilities (Bill S-33, s. 11(2)).

Considerations

This standard would be consistent with the present law in Canada. Arguably, however, if a possible result of an insanity verdict is detention of the accused, the prosecution should be required to prove insanity beyond a reasonable doubt.

Alternative II

Require proof beyond a reasonable doubt.

Considerations

This standard would be consistent with the normal burden on the Crown in criminal cases, and might be seen as particularly appropriate if a possible result of an insanity verdict is detention of the accused. It might, however, be inconsistent with the nature of the issue if the accused who raises insanity is merely required to raise a reasonable doubt as to sanity, or to prove insanity on a balance of probabilities basis.

Issue 6

Should psychiatric and psychological evidence be admissible in insanity cases?

Discussion

Should the law permit psychiatrists and psychologists to testify in regard to insanity and criminal responsibility? As a general rule, opinion evidence is inadmissible. Witnesses are to testify in regard to observed facts, not in regard to inferences or conclusions drawn from those facts. A major exception to this rule is expert evidence. Such evidence is admitted in relation to matters upon which ordinary persons without special knowledge of the subject would be unlikely to form a correct judgment, provided the witness qualifies as an expert in the particular subject matter, through study or experience.

The use of psychiatric and psychological evidence in proving or disproving the insanity defence is an exceedingly complex and controversial issue. Historically, the relationship between law and forensic psychiatry has been a shaky one. Differences and uncertainties continue unabated today. Opinions on the accuracy, efficacy and utility of psychiatric and psychological evidence are strongly divided, though passionately espoused. This climate of uncertainty and disagreement make it difficult to know what reforms, if any, are necessary and feasible.

Alternative I

Provide that psychiatric and psychological evidence shall not be admitted as evidence in insanity cases.

Considerations

The law has generally assumed that psychiatry and psychology can provide "scientific information which is likely to be outside the experience and knowledge of a judge or jury" (R. v. Abbey, per Dickson J). To date, the law has assumed that psychiatric and psychological testimony is sufficiently scientific and reliable to warrant admission as expert evidence. There is substantial empirical information that casts considerable doubt on the validity of that assumption.

Seymour Pollack, a noted forensic psychiatrist, has argued that the psychiatrist's treatment goal, or therapeutic bias, "acts both subtly and overtly to subvert the objective and impartial application of psychiatry for purposes of justice." If the psychiatrist believes that the patient is in need of treatment rather than trial or punishment he or she may be easily swayed to bend the legal rules to achieve a therapeutic result.

Bernard Diamond, another eminent psychiatrist, also notes that this treatment bias will often cause psychiatrists to refuse to give evidence unless it will aid the accused. Some psychiatrists feel that they have a professional obligation to tailor their evidence to achieve the best "treatment" result. Others find that the legal criteria are so imprecise that they do not have to bend the legal rules to achieve a treatment result.

Some eminent lawyers and psychiatrists have argued, on the other hand, that as long as criminal responsibility is based on subjective mental factors, psychiatric and psychological evidence must be admitted on these issues. They have asserted that problems of precision, objectivity, reliability and bias can be dealt with through the adversary system's reliance on cross-examination. Professor Goldstein has pointed out that expert testimony will be required in subtle cases of insanity. In his words, "Only the grossest of aberrations are likely to be noted by [lay] witnesses as symptoms of mental illness. Moreover, the person alleging insanity is not likely to appear very aberrant at the time of trial." Huckabee has added that "opinions of psychiatrists will be necessary as long as the law uses the terms 'mental disease or defect'." If psychiatric and psychological evidence were inadmissible, the accused would have great difficulty proving insanity by lay testimony in all but the grossest of cases. Exclusion of such evidence might be seen as interfering with the accused's right to make full answer and defence.

The disadvantages of retaining mental health testimony in insanity trials may be seen as substantial. Relying upon the adversary system to expose these difficulties and uncertainties is less than ideal since: (1) a general attack on the empirical validity of psychiatric and psychological clinical judgment is an expensive, time-consuming task (and it presupposes that the judge will allow such an attack and be competent to evaluate the empirical evidence); (2) such an attack in each insanity case would be highly wasteful of the accused's or the state's resources (if psychiatric, clinical judgments on insanity are empirically suspect in general, why should this matter have to be separately proven in each case?); and (3) the accused may be financially incapable of making such an attack, or his or her lawyer may be unaware of this avenue of defence.

Alternative II

Continue to allow psychiatric and psychological testimony on the insanity issue, but take the following steps: (1) make mandatory a jury instruction that carefully cautions the jury about the various weaknesses of such evidence, and (2) clearly define the qualifications and experience necessary for offering such expert evidence.

Considerations

This approach would minimize the difficulties discussed above, but would not eliminate them.

Alternative III

Provide for the appointment of a panel of impartial expert witnesses.

Considerations

The impartial psychiatric expert or panel of experts is a device that has been used frequently in the United States to avoid the embarrassing and confusing spectacle of "the battle of the experts." Critics, however, have attacked both the notion that psychiatric experts are or can be impartial and the aura of infallibility and increased credibility surrounding "impartial" experts.

Alternative IV

Provide that expert psychological or psychiatric witnesses shall not be permitted to "offer opinions on the ultimate legal issues before the trier of fact" (ABA Provisional Criminal Justice Mental Health Standards, 1982).

Considerations

In the commentary to this standard, it is explained that a determination of whether the insanity test has been met is the ultimate legal issue. Thus, the expert can not offer his or her opinion on whether the accused has the capacity to appreciate the nature and quality of his or her act or to know that it is wrong. The commentary further explains: "The expert would be restricted to explaining how the defendant's mental disability 'related to his alleged offense, that is, how the development, adaptation and functioning of defendant's behavioural processes may have influenced his conduct' (Washington v. U.S., 390 F.2d 444, 456 (1967))." The ABA standard is premised on the belief that the insanity test "is neither a scientific test nor an inquiry as to a clinical condition," but rather "a moral, social judgment that the defendant's actions, measured by the community's sense of justice and ethics and balanced by the criminal law's need to exert social control, are or are not to be deemed blameworthy." The ABA commentary adds: "The mental health professional is not an expert on this question and it is misleading to present the mental health professional in that light. Scientific credentials may persuade a jury that the issue before them is simply one of deciding which expert is to be believed. The defendant is thus denied the right to have culpability determined by a jury of his peers."

A Standing Committee on ABA Standards for Criminal Justice has provided a critique on the above-mentioned Provisional Standards. In their critique, the Standing Committee recommended that consideration be given to including a precise definition of "ultimate issue of fact" to avoid unnecessary confusion and controversy. The Standing Committee has also recommended the following: "In addition the commentary will need to delineate the extent to which experts may testify regarding all elements of mental condition and the commentary will need to identify precisely the threshold point at which testimony shifts from a description of mental condition and opinions regarding that condition to testimony on 'the ultimate legal issue'."

Alternative V

Provide that "Expert opinion testimony as to how the development, adaptation and functioning of the [accused's] mental processes may have influenced his conduct at the time of the [offence] charged should be admissible. When the [defence] of insanity has been properly raised, opinion testimony, whether expert or lay, as to whether or not the accused was sane [or criminally responsible or insane] at the time of the [offence] charged should not be admissible." (ABA Draft Criminal Justice Mental Health Standards, 1983).

Considerations

According to the ABA commentary to this draft:

> "The rationale for not permitting a mental health professional to offer an opinion as to whether the defendant's general mental condition at the time of the offense met the test for legal insanity is the persuasion that this judgment is not subject to expertise. For, while the test is expressed in terms apparently capable of expert assessment, i.e., the degree of defendant's grasp of the wrongfulness of his conduct, the test is actually posing a query as to whether it is just to hold the defendant responsible for his conduct, given his mental condition at the time. The expert, as a member of society with his own social philosophy and a privileged insight into the workings of the defendant's mind, undoubtedly has an opinion on this issue. He is not, however, an expert on this socio-legal question. It would be misleading to present him as such. Scientific credentials may persuade the jury that the issue before them is simply one of deciding which expert is to be believed. This effectively denies the defendant the right to have culpability determined by a jury of his peers.
>
> The Federal Rules of Evidence are generally liberal on the use of opinion testimony. There is one restriction, however: opinion testimony that is not helpful is excluded. The opinion of an expert in the exact sciences, e.g., engineering, as to the physical causal relationship between a defect in material or design and the collapse of a structure, is of a different nature than that of an opinion as to culpability and as to how society should view the conduct of a mentally abnormal defendant. The scientifically untrained juror is equal to this task. The advisory committee on the Federal Rules

of Evidence, however, was of the opinion that once expert testimony is admitted at all, the expert might as well be allowed to offer his opinion on the ultimate issue since he will manage through circumlocution to get it in anyway. This need not be so. While the experts called by the opposing sides presumably will be of different persuasions as to the degree of mental impairment suffered by the defendant at the time of the offense and undoubtedly will communicate these differences in the manner and content of their testimony, they can, by timely objection, be prevented from responding to questions that merely rephrase the test question.

This limitation on expert opinion testimony is not meant to minimize the importance of expert testimony on the issue of mental condition. The expert is needed to shed light on the inner workings of the defendant's mind and emotions and their interactions at the time of the offense charged. He is needed to explain how the impairment of mental processes may have influenced the defendant's perceptions, judgments, and conduct. Such testimony calls for opinion and inferences derived from data available to the expert and the application of accepted principles and trained insight. Thus, while the expert may not offer an opinion as to whether the defendant could appreciate the wrongfulness of his act, he may, for example, if persuaded from the data that the defendant was suffering an acute phase of a schizophrenic disorder at the time, give his opinion that the defendant's perceptions of reality quite likely were disturbed by hallucinations and delusions, that the defendant was absorbed in the persuasion that his movements were controlled by an outside force and that he did not recognize them as his own. This information may bear directly on the issue of whether the defendant viewed his physical movements as moral acts. The opposing expert, of course, may be of the opinion that the data does not support such inferences and that the 'outside force' is a convenient rationalization by a malingerer.

It is hoped that this shifting of psychiatric testimony away from abrupt conclusions of law and more toward descriptions of psychic functioning and the data which led the expert to his inference will provide the trier of fact with more information upon which to make his own judgment, a long sought goal."

The rule prohibiting lay or expert witnesses from stating an opinion on an "ultimate fact" or "ultimate issue" has been the subject of considerable scholarly criticism. Judicial ambivalence in applying this rule has been aptly summarized in the Report of the Federal/Provincial Task Force on Uniform Rules of Evidence. The latest Supreme Court of Canada pronouncement on this rule was made in Graat v. The Queen, where Dickson J., speaking for the entire court, held that lay opinion evidence may be given only on the issue of whether a person's ability to drive is impaired. Dickson J. agreed with Professor Cross that "the exclusion of opinion evidence on the ultimate issue can become something of a fetish." However, this case dealt with lay opinion evidence and was not addressing the difficult issue of expert opinion evidence on the issue of insanity.

Alternative VI

Provide that any witness (psychological, psychiatric, or otherwise) "may give opinion evidence that embraces an ultimate issue to be decided by the trier of fact where

(a) the factual basis for the evidence has been established;

(b) more detailed evidence cannot be given by the witness; and

(c) the evidence would be helpful to the trier of fact" (proposed new Canada Evidence Act (Bill S-33 (s.36)).

Considerations

It should be noted that expert opinion evidence is currently admitted in regard to matters calling for special knowledge and skill. The ABA proposal is premised on the argument that the ultimate issue in the insanity defence is a socio-legal question, that the mental health expert is not an expert on this question and that therefore his or her opinion on this issue ought not to be admitted. There are strong policy arguments to support this result; the expert's scientific credentials may lead the fact-finder to assume that the expert has some special competence to answer this question, and by deferring unduly to the opinion of the expert, it may result in inadvertently allowing the

expert to usurp the fact-finder's function. Under the Canada Evidence Act proposal, the judge would have a discretion under paragraph (c) to decide whether an opinion on the ultimate issue of insanity "would be helpful to the trier of fact." Because of the various problems involved in mental health expert evidence outlined in this section of the paper, the risks of admitting such opinion evidence on the ultimate issue of insanity may outweigh any help such opinion would be to the trier of fact. Some might favour outright exclusion of such opinion evidence on this ultimate issue, rather than leaving it to the discretion of judges to be decided on a case by case basis.

Issue 7

What form of verdict should result from a finding of insanity?

Discussion

In Canada, at least in the case of indictable offences, successful reliance on the insanity defence results in the special verdict of "not guilty on account of insanity," in England, a similar verdict was originally discretionary, became mandatory in 1800, was changed in 1883 and became known in popular language as "guilty but insane", and 80 years later was changed back again to "not guilty by reason of insanity." An alternative verdict of "guilty but mentally ill" has been enacted recently in several states of the United States. The special verdict in Canada is a direct descendant of an English statute of 1800 which created the mandatory, special verdict in English criminal law.

It has often been said that the verdict of "not guilty on account of insanity" is unpopular with, and misleading to, the general public. First, it has been suggested that the words "not guilty" in the special verdict may leave the impression that the acquitted person is unconditionally set free, since that is the invariable consequence of the general verdict of "not guilty." This criticism could be met in part by instructing the jury on the consequences of a verdict of not guilty on account of insanity. However, the general public might still be misled. Regular reporting in the media of the judge's instruction on the jury on this issue would be helpful, but unlikely.

Second, the "not guilty" portion of the special verdict seems contradictory to some people in cases where the evidence is clear that the accused has committed the prohibited harm. In their opinion, for example, John Hinckley is "guilty" of attempting to murder the President of the United States,but exempt from punishment by reason of insanity. To them it seems ridiculous to say that Hinckley is "not guilty" of attempted murder. This view, of course, is premised on the belief that the commission of the prohibited harm is sufficient by itself to constitute guilt. As noted earlier, this was the early common law view, where criminal liability was absolute upon proof of the actus reus. Justifications and excuses did not prevent convictions but they provided good grounds for a pardon from convictions and punishment. For the past several centuries, criminal liability generally has been based upon the existence of actus reus and mens rea and the absence of any justification or excuse. If the word "guilty" is intended to be synonymous with criminal liability (and at the moment, in our criminal law, it is), then a verdict such as "guilty but insane" would be ambiguous. It would imply that criminal responsibility has been imputed, when in fact it has not. The verdict "not guilty on account of insanity" is more accurate, since it implies that there is no criminal responsibility and the reason for this fact is the accused's insanity.

Third, it has been suggested that the words "not guilty" in the special verdict do not express the necessary public disapproval of the harm caused. The proponents of this view explain that the words "not guilty" often conjure up in the public eye visions of innocence. There are many reasons for this. Guilt and innocence have ancient religious roots. These words are often used as opposites. Likewise, there is a legal maxim and a constitutional principle that a person is "presumed innocent until proven guilty...." If a person is found not guilty, does it not seem logical to say that he or she must be innocent?

If the words "not guilty" are associated with the concept of innocence, then it may be true that these words "not guilty" do not express the necessary public disapproval of the harm or wrong that has been done to the victim. How can one express anger, revulsion and disapproval of conduct that is "innocent"? The difficulty here is the failure to distinguish between the act and the actor. An act may be wrongful and harmful, but the actor may be excused from blame. The verdict "guilty" or "not guilty" speaks to the personal attribution of blame or responsibility to the actor; it is not a statement on the lawfulness or innocence of the act.

The problem described above is a serious one. If the public continues to rely upon the notion that the verdicts "guilty" and "not guilty" speak to the innocence or wrongfulness of the act as well as the blameworthiness or otherwise of the actor, then they will continue to view verdicts of "not guilty on account of insanity" (rather than "guilty but insane") as ridiculous and inadequate. The verdict "not guilty on account of insanity" will be seen as inadequate because the words "not guilty" imply, at least for some members of the public, that the act is innocent and therefore the words "not guilty" do not express the necessary public disapproval of the harm caused. By contrast, a verdict of "guilty," even if punishment is withheld because of the existence of a valid excuse, makes a statement, at least for some members of the public, on the wrongfulness of the harm caused. Thus, for the public who assume that the verdict "guilty" or "not guilty" is a statement as to the act as well as to the actor, the "guilty" verdict provides a "civilized" mechanism to express society's feelings of anger, revulsion, vengeance and disapproval for the harm caused.

The problems described above with the verdict of "not guilty on account of insanity" are perhaps symptomatic of a larger problem in our criminal law system. Both the legal profession and the public use terms such as guilt, innocence, culpability, blameworthiness, conviction, acquittal, crime and offence somewhat loosely, assuming that they have an obvious and commonly accepted meaning, when in fact they do not. One illustration of this problem, which is relevant to the subject of verdicts, is the relationship between the word "guilty" and the word "offence." The Criminal Code, in its offence-creating sections, sets out norms of prohibition or command and everyone who breaches these norms is, in the words of the Criminal Code, "guilty" of "an [indictable or summary] offence" and liable to [a specified punishment]." Are the words "guilty," "offence" and "liable" coextensive? The word "offence" is a legal construct; the more popular expression "crime" is not used. Legally, the concept "offence" consists of actus reus, any necessary mens rea, and the absence of justification (e.g., self-defence), but not the absence of excuse. When an excuse is successfully raised, it does not negate the offence; it excuses the actor from liability, culpability or legal guilt. Excuses do not negate the offence but they do negate legal guilt; no finding of guilt is made, no conviction is entered. Because of this distinction in legal theory

between elements of the offence and justifications on the one hand, and excuses on the other hand, it is possible legally to commit an offence, but legally not to be guilty of the offence (because of a valid excuse). To say the least, this is confusing to the public.

When one considers this problem in the context of the insanity defence, the situation is even stranger. In some cases, insanity negates the mens rea. In other cases, mens rea exists and insanity acts as an excuse. In the first case, no offence occurs. In the second, an offence occurs, but is excused. The wording of section 542, "at the time the offence was committed" (emphasis added), assumes that insanity acts only as an excuse. The language of s. 16 is more careful. It does not assume that the acts or omissions necessarily constitute an offence. The present distinction in law between offence and guilt is not only hard to rationalize, it also makes drafting of sections dealing with insanity particularly treacherous.

The discussion of the meaning of "guilt" and "offence" as legal concepts reveals the existence of a more general problem: the general verdict "not guilty" is not very informative for the public. It expresses a conclusion or judgment, but gives no reasons. Judges are expected to give reasons for their judgments, but juries are not asked or required to give even elementary explanations for their verdicts. However, the narrower point of relevance here is that a general verdict of "not guilty" lacks necessary specificity. It does not tell the general public whether: (1) the prohibited harm has not been proven; or (2) the harm occurred but there is a reasonable doubt whether this accused caused it; or (3) this accused caused the harm, but it was not intended because of mistake, intoxication, insanity or some other reason; or (4) the accused intentionally caused the harm but he or she was justified by lawful authority, self-defence or otherwise; or (5) the accused intentionally caused the harm but he or she is excused from liability because of duress, insanity, entrapment or some other excuse. These situations are vastly different, yet the public is left in doubt as to which one applies. If public acceptance of our criminal laws and their administration and enforcement is important, and few would doubt that it is, then perhaps the public should be given a clear explanation of why the accused is not guilty.

The special verdict of insanity is the one instance where an explanation is given. But the special verdict that we presently have is, arguably, incomplete and misleading, at least to some members of the public. Arguably, this form of the verdict is incomplete since it does not make it clear that the accused committed the prohibited harm. If the special verdict is only used when there are no grounds for a general verdict of "not guilty," then the special verdict necessarily implies that the accused has committed the proscribed harm. But this necessary implication is neither clear nor obvious to the public from the verdict itself. The special verdict enacted in England in 1883 (i.e., "guilty but insane") avoided this criticism by making it crystal clear that the accused committed the act charged. But this verdict had prohibitive problems of its own, which will be explained below.

Alternative I

Provide for a verdict of "not guilty."

Considerations

It could be argued that insanity, like any other excuse or defence, should result in the general verdict of "not guilty." But the special verdict and its special consequences were enacted in 1800 because it was thought to be unsafe to let an insane murderer such as Hadfield go free as he would if the normal consequence of a "not guilty" verdict were applied. The response to this claim is that the purpose of the criminal trial is to render a verdict of "guilty" or "not guilty" for a particular act at a particular time, months or years before; the criminal trial is not a vehicle for determining present dangerousness or for triggering preventive detention. If evidence of insanity were presented at trial, and the accused were given a general verdict of "not guilty," the issue of preventive detention could be raised in a separate civil commitment hearing, immediately after the acquittal if necessary. Depending on the province, the prosecutor, the police, the judge, the victim or any member of the public may lay an information upon oath before a justice that he or she believes that the accused is suffering from a mental disorder and is a danger to himself or herself or others and thereby initiate a civil commitment hearing if the justice believes such a hearing is warranted.

This option has the advantage of putting to an end the use of a criminal verdict as an automatic, mandatory form of preventive detention. However, it suffers from the many faults of the general verdict that have already been noted, namely: it is not informative of the reason for the acquittal; it may suggest to some people that the act is innocent rather than the actor; and it may not provide a sufficient mechanism for some people to express their disapproval of the harm caused.

Alternative II

Provide for a verdict of "guilty of the act or omission charged, but insane at the time the accused did the act or made the omission."

Considerations

This verdict was instigated by Queen Victoria in an effort to make it clear that the accused did the act charged and with the expectation that a "guilty" verdict would act as a greater deterrent for would-be offenders than the "not guilty by reason of insanity" verdict.

The advantage of this verdict is that it makes it clear that the accused committed the act charged, that he is not innocent of the act, that the act is not condoned as appropriate behaviour, but that it was committed by an insane person. Unfortunately, this advantage may not outweigh the verdict's disadvantages. One disadvantage of this form of the verdict is that it does not specify that the accused is "not criminally responsible" and it leaves the impression that the verdict is a conviction rather than an acquittal. In fact, the English Court of Appeal treated it as a conviction, at least in regard to appeals, for some years before the House of Lords declared that it was an acquittal. But that decision does not remove the criticism that, on its face, the verdict is misleading since it appears to be a conviction rather than an acquittal. This misrepresentation was all the more apparent when the popular but inaccurately contracted form of its verdict, namely, "guilty but insane," was raised by judges and juries.

Another disadvantage of this verdict is that it uses "guilty" to refer to the commission of the actus reus alone, whereas "guilty" is used in all other contexts to be synonymous with criminal responsibility or blameworthiness (i.e., actus reus, mens rea, and the absence of justification and excuse). In this way, it confuses the word "guilty" and devalues it as a symbol of responsibility and blame.

The Atkin Committee (1923) and the Royal Commission on Capital Punishment (1949-1953) recommended a change in this special verdict. Their proposal was that the verdict should be "the accused did the act (or made the omission) charged, but is not guilty on the ground that he was insane so as not to be responsible, according to law, at the time." One possible objection to this formula is that it is a bit long and cumbersome. What follows is a modified form of this verdict.

Alternative III

Provide for a verdict of "not responsible for the proscribed harm committed while insane."

Considerations

This form of the verdict is arguably more accurate and informative. Admittedly, it is longer than our present verdict, but its public education value may be worth that cost.

This form of the verdict substitutes the words "not responsible" for "not guilty." In law, these terms seem to have the same meaning, but they may not have the same meaning for all members of the public. In any event, since some members of the public associate the words "not guilty" with the absence of fault or harm and the unconditional release of the accused, perhaps it is better to use other words like "not responsible" which do not necessarily bear this connotation. (New York and Oregon have recently replaced "not guilty" with "not responsible" in their insanity verdicts).

This form of the verdict adds the words "for the proscribed harm committed" to make it clear to the public that harm has been committed and that such harm is proscribed and not approved. An alternative variation might read: "committed the proscribed harm, but not responsible by reason of insanity."

Either form of this verdict could be used with the words "not guilty" replacing "not responsible" if one thought the former to be preferable to the latter.

Another variation of this verdict could involve substituting the words "act or omission constituting the offence" in lieu of "proscribed harm." The verdict could also read: "Not responsible because of insanity at the time the acts or omissions constituting the offence were committed."

Alternative IV

Same as any of the above 3 alternatives, but substitute the expression "mental disorder" for "insanity."

Considerations

The term "insanity" has been criticized as being archaic, and as leading to difficulty in communication between psychiatrists and lawyers. However, one might wish to retain the word "insanity" for any one of several reasons. It may, for example, be argued that since it is not a word in current medical use, this helps to emphasize that the issue is a legal rather than a medical one; the words "mental disorder "might invite a greater medical usurping of the issue. Further, the term insanity has been used for a long time, it is familiar to the public and it conveys the fact that the mental impairment must be quite severe; better than the term "mental disorder" would since this latter term is often used to describe minor as well as major impairments (such as minor depressions, phobias or anxieties). Also, it may be argued that while the term "mental disorder" is more clearly a medical term, the insanity defence is a legal concept and requires a legal meaning. Changing the name to "mental disorder" may not lessen the difficulties of legal definition.

Issue 8

Should the special verdict apply to both indictable and summary conviction offences?

Discussion

Section 16(1) of the Criminal Code states that "No person shall be convicted of an offence in respect of an act or omission on his part while he was insane." Insanity is clearly a defence to all offences, whether indictable or summary conviction. But ss. 542 and 545 refer only to indictable offences. There is no provision in the Criminal Code for the disposition of persons found not guilty of summary conviction offences on account of insanity. A similar omission existed in England but the matter was corrected in 1840. One explanation could be that the consequences of ss. 542(2) and 545 are far too drastic for a summary conviction offence. However, there is good reason to doubt that this was the real reason and, in any event,

this explanation hardly explains why at least the verdict "not guilty on account of insanity" in s. 542(1) was not extended to summary conviction offences even if the provisions for custody were not. The more likely explanation is that the omission was a legislative oversight. (Note that the LGW provisions apply to all persons found to be unfit to stand trial, regardless of which type of offence they were charged with). This is understandable since the insanity defence was normally raised only in the most serious of offences. Whatever the reason, it is an anomaly that should be addressed.

Issue 9

Should provision be made for informing the jury of the consequences of an insanity verdict?

Discussion

At present, there is no provision in the Criminal Code either expressly allowing or requiring the jury to be informed of the consequences of an insanity verdict. While there is very little Canadian jurisprudence on the subject, those courts that have dealt with the issue have said that: (1) as a general rule juries are not to be informed of the consequences of their verdicts: (2) as an exception to this general rule, counsel may inform the jury of the consequences of an insanity verdict; (3) the jury should be told that the consequences of a verdict should not influence their verdict; and (4) while the trial judge has no duty as a matter of law to direct the jury on this issue, it may be wise to do so, particularly when the evidence indicates that the accused is a dangerous individual and counsel have not informed the jury of the consequences of an insanity verdict. What ought to be said in regard to informing the jury of the consequences of an insanity verdict remains unclear; in particular, doubt exists as to whether reference ought to be made to the length of any confinement that may be ordered, the place of such confinement, the review process and the availability of treatment (assuming that confinement is the option chosen).

Alternative I

Provide that jurors may not be informed of the consequences of an insanity verdict.

Considerations

The general rule that juries are not to be informed of the consequences of their verdict is a sound one. Its justification is found in its rational connection to the function of the jury. It is the jury's function to decide, on the evidence presented, whether the offence charged has been made out. The issue of sentence or disposition is for the judge. Sentence or disposition is in no way relevant to the decision whether or not the accused is innocent or guilty. Therefore, the extraneous factor of what happens to the accused if a particular verdict is returned should not be permitted to interfere with the jury's fact-finding duty. In determining innocence or guilt, the jury should not be influenced by considerations of what will happen to the accused as a result of their verdict.

In many American jurisdictions, the jury cannot be informed of the consequences of an insanity verdict. The main reason for this is the belief that such information is not relevant to the jury's fact-finding function and that provision of such information encourages unwarranted compromise verdicts. If jurors are informed that an insanity verdict may result in the accused being committed to a psychiatric institution for treatment and that he or she will not be released until safe, some people believe that such information may influence the jury to return an insanity verdict as a compromise between imprisonment and absolute release. If jurors assume that treatment is unavailable in prison and that the accused needs treatment, some people assume that jurors will be all the more inclined to return an insanity verdict.

Are these assumptions about juror behaviour warranted? The data on these assumptions are scarce. Professor Simon did find a desire on the part of jurors to return a verdict of "guilty but in need of treatment." However, Simon did not find any evidence that the need for treatment was a sufficient influence on the jurors to cause them to change a "guilty" verdict to a verdict of "not guilty by reason of insanity."

Alternative II

Make provision for informing the jury of the consequences of an insanity verdict, and for informing the jury as well that this information is not to influence their verdict, but that it is being given to them to prevent extraneous considerations or misapprehensions relating to disposition from interfering with their verdict.

Considerations

Those cases in which an exception to the general rule seems to have been made as regards the consequences of an insanity verdict indicate that such exception is premised on the assumption that some jurors may be labouring under the misapprehension that a verdict of "not guilty on account of insanity" would result in the accused (who may still be dangerous) being allowed to go free and that such a misapprehension may influence them not to return an insanity verdict that is otherwise warranted. How common is such a misapprehension? Simon, in mock-jury studies in Chicago, St. Louis and Minneapolis, found that 91 percent of jurors assumed, without being told, that an insanity verdict would result in the accused being committed to a mental institution. Three percent assumed that probation or being set free was the consequence. The study did not reveal how many of the remaining six percent, if any, were influenced by their mistaken assumption to return a verdict of "guilty" rather than "not guilty by reason of insanity". Although Simon's view of the data indicates that an instruction on the consequences of an insanity verdict may not be needed since over 90 percent of the jurors assumed its consequences correctly, she does conclude that "it would be a useful precaution to include such an instruction under all circumstances and not leave it to the common sense of the jury. On occasion it can do some good and it can never do any harm."

Are Canadian jurors as knowledgeable or more knowledgeable about the consequences of an insanity verdict than Simon's American verdict? It seems safe to assume that not every Canadian juror will assume correctly the consequences of an insanity verdict. If that is so and if jurors may be adversely influenced by their misapprehension, then one may agree with Simon that it is a "useful precaution" to advise the jury of the consequences of an insanity verdict.

It is arguable that the risk of the jury being influenced by extraneous matters of disposition or treatment to a greater degree when informed of these matters and told that they are extraneous is outweighed by the miscarriage of justice that would result if a jury's misapprehension about release of the accused caused them to return a "guilty" verdict when a "not guilty on account of insanity" verdict is warranted. This conclusion is fortified in part by the fact that the judge instructs the jury that it is their duty to return a true verdict and not to be influenced by matters of disposition. If

no instruction is given, jurors are not expressly told that they are not supposed to take into account the consequences of their verdict in reaching their decisions and thus one may speculate that the risk of this occurring is greater.

Issue 10

Assuming that the jury is to be told about the consequences of an insanity verdict, what provision should be made concerning the contents of the instruction?

Discussion

What should the jury be told about the consequences of an insanity verdict? Should the length of any possible confinement, the place of any such confinement, the release or review process, the availability of treatment and other such matters be communicated by the trial court?

In determining the question of what ought to be told to the jury, one should keep in mind that the purpose of the rule about informing the jury is to encourage true verdicts, verdicts that are not influenced by extraneous matters such as disposition. But since experience and research indicates that jurors have a natural interest in disposition, it is important that they do not have misconceptions about disposition that may influence their deliberations and that they be warned that disposition is not a relevant factor in the discharge of their duty. The two misconceptions that are most often thought to be influential in a juror's verdict are: (1) that a "not guilty on account of insanity" verdict will result in the accused [even a dangerous accused] going free; and (2) that under the law an accused in need of psychiatric treatment may only receive that treatment by being found insane and sent to a psychiatric institution rather than being found guilty and sent to prison. The first misconception may influence jurors to return a verdict of "guilty" when the proper verdict is "not guilty on account of insanity." The second misconception may cause jurors to return a verdict of "not guilty on account of insanity" when the proper verdict is "guilty."

Alternative I

Provide that the jury ought to be told: (1) where the accused is likely to go if acquitted; and (2) that there exists a mechanism for treating convicted prisoners who are mentally disordered.

Considerations

Arguably, it is only necessary, in order to dispel misconceptions that may be prejudicial to a true verdict, that these two points be dealt with. Any more elaborate explanation may be irrelevant and may encourage greater rather than lesser speculation by the jury on the effect of an insanity verdict.

Issue 11

Assuming that the jury is to be told about the consequences of an insanity verdict, who should so instruct them?

Discussion

In R. v. Conkie, Moir J.A. noted that in Alberta the practice, at least since 1942, has been that "counsel for the defence often advises the jury as to the provisions of s.542 of the Criminal Code." In R. v. Lappin, counsel for the Crown advised the jury about the consequences of an insanity verdict. The trial judge also informed the jury of the consequences. In R. v. Smith, defence counsel asked the trial judge to advise the jury. In these cases, the matter was brought to the jury's attention by three different parties -- defence counsel, prosecutor and judge. Should there be any rule on who may inform the jury?

Alternative I

Allow either counsel to inform the jury.

Considerations

In regard to the prosecutor informing the jury, it may be argued that if the prosecutor is prevented from raising the insanity defence, he or she has little justification for informing the jury of the consequences of an insanity verdict. This argument is based on a

misconception of the rationale behind the rule permitting the jury to be informed of the consequences of an insanity verdict. The rule is not designed solely for the party raising the insanity defence, to be invoked solely at his or her discretion. The rule is designed to encourage true verdicts, whether or not such verdict is the one sought by the party raising the insanity defence. A prosecutor has as much interest, if not more, in the jury returning a true verdict as defence counsel does.

A possible solution to this potential problem might be to allow either counsel to inform the jury, but only in accordance with the simple and brief instruction referred to in the previous section. If counsel deviated from that instruction, the trial judge could intervene and make any necessary corrections. The words of the general instruction, and the judge's power of supervision over its delivery by counsel, would arguably be adequate devices to ensure that the purpose of the instruction (i.e., to encourage true verdicts and to discourage reliance on extraneous matters) is achieved.

Alternative II

Provide that only the judge may inform the jury of the consequences of an insanity verdict.

Considerations

This approach would avoid the potential drawbacks of Alternative I. If, however, the jury were only informed of the consequences of an insanity verdict in the course of the judge's charge, this approach might be perceived as having at least one drawback; counsel may want the jurors to be informed at an earlier point so that they will not be distracted by any extraneous factors when they are listening to counsel's evidence and arguments.

Issue 12

Assuming that the jury may be told about the consequences of an insanity verdict, should a judicial instruction be mandatory or discretionary?

Discussion

In the United States, the majority of courts have held that the jury should not be informed of the consequences

of an insanity verdict, although there is a growing trend in courts and legislatures to permit such an instruction. However, there is considerable disagreement amongst these latter jurisdictions as to whether the instruction should be mandatory or discretionary (and, if discretionary, at whose discretion). In some jurisdictions, the instruction is given only if the accused requests it. In other jurisdictions, it must be given unless the accused objects. In some jurisdictions, it must be given even if the accused objects, and in a few jurisdictions, it may be given despite the accused's objection. In some jurisdictions, it may be given if the jury inquires (assuming they are aware of their ignorance) and if the accused does not object. One commentator (Schwartz) has argued that rather than imposing an inflexible requirement that the instruction must be given, the trial judge should be given a discretion to provide the instruction when he or she feels it is necessary to avoid juror misapprehension or bias.

Alternative I

Make the instruction discretionary.

Considerations

It has been argued (by Schwartz) that an inflexible rule either requiring or prohibiting the instruction in all cases is appropriate. Requiring the trial judge to give instruction might tempt the jury to arrive at a "compromise verdict." On the other hand, prohibiting the instruction might create an injustice where there is the possibility that the prosecution's argument has created misapprehension as to the consequences of the insanity verdict. In many cases, it is likely that one counsel or the other will inform the jury of the consequences of the insanity verdict. If neither does, it is arguable that the trial judge should have a discretion to inform the jury if he or she believes that such information is more likely to enhance a true verdict than to lead to a compromise verdict. If counsel does inform the jury, it is arguable that the judge should, as with other points of the law, also instruct the jury on this issue so that the jury gives as much credibility to counsel's statement of this point as they do to the other points of law on which the judge charges them (although failure to do so should not be considered a "substantial wrong or miscarriage of justice" (Criminal Code, s. 613(1)(b)(iii)).