The Insanity Defence: The Law, its Shortcomings and Proposals for Reform

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The insanity defence has long been the subject of heated debate by courts, Commissions, legal scholars and psychiatrists. So much attention may seen unwarranted as the insanity defence is rarely pleaded and seldom successful[81]. However, there is great symbolic value in this defence, as it represents a merger of law, social science, ethics and morality. Also, the insanity defence stirs strong emotions in the public as many see a successful plea of insanity as allowing someone to "get off". Legislators seem timid to reform the essence of the insanity defence as long as it appears to be functioning properly. Is the insanity defence in Canada functioning properly? To assess this, one must first understand the purpose of the criminal law and the rationale behind the insanity defence.

The rules for assessing guilt in criminal law are largely based on criteria of responsibility and blameworthiness. Most fundamentally, responsibility depends on the assumption that humans are rational and autonomous - that we have the capacity to reason right from wrong, and the capacity to choose between them. Punishment of persons who cannot make rational choices because of a mental disorder makes no sense either as retribution, or as a deterrent[82]. Therefore, the insanity defence should exempt from criminal liability those who are incapable of rational choice. As Finkel states, a test for insanity must indicate if an individual is "response-able"[83].

The Current Law - Does it serve this rationale?

The defence of insanity was recognized at common law in the fourteenth century as a defence to a criminal charge[84]. The first Canadian *Criminal Code*, enacted in 1892, included the defence of insanity which was a codification of the M'Naghten Rules set down in England in

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81 Canadian statistics are not available. However, S.D. Dell, "Wanted An Insanity Defence that can be Used" [1983] Crim L.R. 431 at 431, notes that in England, no more than one or two people per year are acquitted in the courts on the grounds of insanity. In 1981, in the U.S., only four federal defendants successfully pleaded not guilty by reason of insanity. See L. Caplan, The Insanity Defense and the Trial of John W. Hinckley, Jr. (Boston: D.R. Godine, 1984) at 116.

82 See generally, I. Keilitz & J.P. Fulton, The Insanity Defense and Its Alternatives: A Guide For Policy Makers (Williamsburg, Va.: Institute on Mental Disability and the Law, 1984) at 5.

83 N.J. Finkel, Insanity on Trial (New York: Plenum Press, 1988) at 261.

84 See G.A. Martin, "Mental Disorder and Criminal Responsibility in Canadian Law" in S.J. Hucker, C. Webster & M. Ben-Aron, eds., Mental Disorder and Criminal Responsibility (Toronto: Butterworths, 1981) at 15.

1843[85]. Today the insanity defence is found in s. 16. Although s.16 was recently amended by Bill C-30, which received Royal Assent by the House of Commons on December 13, 1991, the essence of s.16 is much the same as the insanity defence provision which was enacted in 1892.

Does the current insanity defence exculpate those who are not capable of rational choice? In my view it does not. The test in Canada only exculpates those who have a "mental disorder" and who exhibit one of two symptoms of a "defect of reason" - being incapable of appreciating the nature and quality of their acts, or being incapable of knowing what they have done is wrong. A person who is capable of rational thinking, but is not capable of conforming his actions with this knowledge cannot use the insanity defence in Canada.[86]

Reform Proposals in Canada - Do they serve the rationale?

In essence, the most recent reform initiatives proposed by the Law Reform Commission of Canada (LRCC) and the Department of Justice, and the text chosen by parliament as found in Bill C-30 are rewordings of the M'Naghten Rules. These law reforming bodies do not appear to address the question of "what ought to be the scope of the insanity defence?" For example, in 1982, the LRCC analyzed whether the insanity defence should be retained, and their reasons for retention centred around tradition, as well as the fact that it would be immoral to not provide such a defence. They did not address whether or not the existing defence actually served those to whom it should apply. This LRCC did include an alternative that included a test of volition, but it preferred to exclude this test as it feared that the test would allow psychopaths to be acquitted too readily[87].

Reform Proposals in Other Jurisdictions

United States

In 1962, the American Law Institute (ALI) in its Model Penal Code provided a formulation for the insanity defence[88]. This formulation is based on the view that a sense of understanding broader than mere cognition ("appreciation"), and volitional incapacity should be directly in the

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[85] (1843) Clark & Fin. 200. M'Naghten shot and killed Drummond, Prime Minister Sir Robert Peel's private secretary, believing him to be Peel. M'Naghten was under an insane delusion that he was being hounded by enemies of whom Sir Robert Peel was one.

[86] The Canadian law and the M'Naghten Rules are based on an obsolete theory of psychology which sees the functions of the mind as compartmentalized. Current psychological theories view human personality functions as an integrated unit such that serious mental illness impairs not only cognitive functions, but also will and emotions. *Supra*, note 84 at 19. See also Great Britain, Committee on Mentally Abnormal Offenders. (Butler Committee), Report of the Committee on Mentally Abnormal Offenders, (London: H.M. Stationery Office., 1975), para. 18.6; American Psychiatric Association, "American Psychiatric Association Statement on the Insanity Defence" (1983) 140 Am. J. Psych. 685.

[87] Law Reform Commission of Canada, Criminal Law, The General Part: Liability and Defences (Ottawa: Law Reform Commission of Canada, 1982) at 42.

[88] *Supra*, note 23, s.4.01.

formulation of the defence. By 1984, all circuits of the Federal Court of Appeals, and 24 of the 50 States had adopted the Model Penal Code formulation with minor modifications[89].

Following the acquittal of John Hinckley, on account of unsoundness of mind in attempting to assassinate President Reagan, the federal law was altered[90], in effect, to the M'Naghten Rules, and several States have followed suit. The volitional element was omitted because there was evidence that it was difficult for a jury to distinguish between an impulse that could not be resisted and an impulse that was not resisted[91].

It is interesting to note that the M'Naghten Rules and the Insanity Defence Reform Act (1984), both of which are restrictive insanity tests, were reactionary responses to public outcry after someone was acquitted from trying to kill the head of the country. Reforms conceived in such an atmosphere are rarely satisfactory.

England

At present, the insanity defence in England is based upon the M'Naghten Rules. There have been two significant initiatives for reform: the Butler Committee[92] and the work of the Law Commission on a Draft Criminal Code for England and Wales[93]. It is recommended that the insanity defence be limited to those who exhibit "severe mental illness" which is defined in detail. Under this proposal, any person who fits the criteria would be presumed to be not guilty on the basis of severe mental illness. There is no separate inquiry into cognitive capacities. However, it is my belief that this approach is so rigid and complex that there could be endless appeals about the proper interpretation of the terms used. Also, the presumption that a causal link exists between the offence and the defendant's mental condition is over-reaching.

Australia

The insanity defences in Queensland, Western Australia and Northern Territory include both cognition and volition tests[94]. This type of test has also been recommended for introduction in South Australia[95].

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89 *Supra*, note 82 at 14-15.
90 Insanity Defense Reform Act 1984, 18 USC 20 (U.S.A.)
91 American Psychiatric Association, *supra*, note 86 at 685.
92 See Butler Committee, *supra*, note 86.
93 *Supra*, note 24.
94 Qld: s.27; WA: s.27; NT: s.35(1).
95 South Australia, Criminal Law and Penal Methods Reform Committee, Fourth Report: The Substantive Criminal Law (Adelaide: The Committee, 1977) at 43-44.

It should be noted that the Tasmanian Law Reform Commissioner has recently recommended abolition of the insanity defence[96]. Evidence of mental illness would then go to mens rea, and if the requisite mens rea is not negated, the evidence of mental disorder would go to disposition.

There are stronger arguments for the retention of the insanity defence. The insanity defence is essential to the moral integrity of the criminal law. For example, *mens rea* and the insanity defence are conceptually independent. In applying the insanity defence, one is determining whether the defendant had the capacity to form the intent. In a mens rea analysis, one is determining whether the individual had the actual requisite intent at the time the offence was committed. Capacity is assumed when one is analyzing mens rea[97]. Also, with a mens rea approach, a person whose mental illness negates the requisite intent should be acquitted. This individual would then not get the treatment that s/he needs.

Recommendations to Serve the Rationale of the Insanity Defence

The previous discussion has illustrated that the insanity defence should be retained, but that the present defence is unsatisfactory. In particular, it does not negate criminal responsibility for all individuals who are incapable of rational choice. Another difficulty with the present defence, is that it only allows those with very severe impairments to be fully excused from criminal liability. The stark choice between guilty and not criminally responsible on the ground of mental disorder does not reflect the fact that mental disorders range along a continuum[98], and, therefore, no clear boundary can be drawn between responsibility and irresponsibility. It is arguable that community respect can only be maintained if the criminal law grades condemnation according to moral turpitude.

In Canada, we allow evidence of mental disorder, short of insanity to be admitted to negate the requisite mental element for "specific intent offences"[99], reducing the charge to a lesser and included offence. However, for offences other than specific intent offences,

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[96] Tasmania, Paliament, Law Reform Commissioners , Insanity, Intoxication and Automatism, (Hobart, Tasmania: M.C. Reed, 1989) at 10. Abolition has also been suggested by some academics. See N. Morris, Madness and the Criminal Law (Chicago: University of Chicago Press, 1982); J. Goldstein & J. Katz, "Abolish the Insanity Defence- Why Not?" (1963) 72 Yale L.J. 853. In fact three jurisdictions in the United States - Montana, Idaho, and Utah - have also abolished the insanity defence.

[97] The presumption of sanity is found in s.16(2) since the enactment of Bill C-30.

[98] Law Reform Commission of Victoria, Mental Malfunction and Criminal Responsibilit, (Melbourne: The Commission, 1990) at 49.

[99] R. v. Hilton , (1977) 34 C.C.C.(2d) 206 (Ont CA). The defence of diminished responsibility *per se* does not exist in Canada; Chartrand v. The Queen, [1977] 1 S.C.R. 314.

psychiatric evidence may only be used with regard to the insanity defence[100]. Does this seem logical?[101]

It is interesting to note how other jurisdictions deal with this issue. England has the doctrine of diminished responsibility which reduces murder charges to manslaughter for those with a substantial "mental abnormality". In some Australian States, there is a diminished responsibility doctrine similar to that in England. There are several doctrines which exist in the United States as partial excuses for those with some mental problems. Diminished capacity, which germinated in California, is very similar to our "specific intent doctrine". The ALI recommends a diminished responsibility defence similar to that in England. In other states, diminished responsibility is a defence to a broader range of crimes than murder. A number of States have adopted a "guilty but mentally ill" (GMBI) verdict as a supplement to the insanity defence, available for those who are mentally ill at the time the offence was committed, but do not meet the insanity test.

Most of the criticisms of partial insanity defences relate to the terminology and procedure and not with the rationale. In fact, in Canada we have the defence of infanticide, and it would be inconsistent not to allow other similarly compelling mental disturbances which affect both men and women to form the basis of a partial excuse. Also, there is no logical reason to restrict the defence to those charged with murder. Although, neither the Law Reform Commission nor the Working Group on the General Part made a recommendation regarding diminished responsibility, appropriate legislation would provide sufficient guidance to the judiciary and would meet with public approval.

Based on the above discussion, it is proposed that the Subcommittee on Justice and the Solicitor General which will work towards the reform of the General Part of the *Criminal Code* consider the following draft legislation:

Amend s.2 of the *Criminal Code*:

"mental disorder" means natural imbecility or disease of the mind.

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[100] A. Stalker, "The Law Reform Commission of Canada and Insanity" (1982-83) 25 Crim: LQ. 223 at 242.

[101] For a criticism of the specific intent doctrine, see D.P. Reynolds, "Mens Rea and Mental Disorder: Recent Developments in Canadian Criminal Law "(1979) 37 U.of T. Fac. L.Rev. 187. There have been some reform initiatives in favour of a partial excuse. See the dissent in: Canada. Royal Commission on the Law of Insanity as a Defence in Criminal Cases, Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (Hull, Que: Edmond Cloutier, Queen's Printer, 1957). See also L.R.C.C (1982), *supra*, note 87 at 52-53, which created a threshold of "substantial capacity" in Alternative 2 to allow for the appropriate disposition of disturbed offenders.

Bill C-30 added, to section 2, a provision which reads: "mental disorder" means a disease of the mind. Thus it fails to exculpate from criminal responsibility those who would formerly have been exculpated because of "natural imbecility".

Exemption

Mental Disorder

A person is not criminally responsible if at the time of the relevant conduct, the person, as a result of mental disorder, was incapable of:

I) rational thought, demonstrated by an inability to appreciate the nature and consequences or wrongfulness of the conduct, or
II) conforming to the requirements of the law.

Partial Exemption

Guilty but Mentally Ill

A person is "guilty but mentally ill" if at the time of the relevant conduct, the person was guilty of the offence, but suffered from a mental illness that substantially impaired his/her ability to:

I) think rationally, demonstrated by an inability to appreciate the nature and consequences or wrongfulness of the conduct, or
II) conform to the requirements of the law.

This partial exemption will subsume infanticide, which is presently found at s.233 of the *Criminal Code*[102].