

INSANITY AS A CRIMINAL DEFENCE: A CONFLICT OF VIEWS*

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An article by this writer entitled "Irresistible Impulse and Crime", published in the April 1946 issue of the Canadian Medical Association Journal,¹ has brought forward renewed suggestions from members of the medical profession as to possible amendment of section 19 of the Criminal Code. It has been proposed by some psychiatrists, in particular Dr. G. H. Stevenson,² that the question of revising that section be taken up with the Canadian Bar Association by the recently formed Section on Psychiatry of the Canadian Medical Association.³ Dr. Stevenson, like countless others in his profession, contends that the law on this subject is unsatisfactory and behind the times.

Section 19 is a summarized statement of the "Rules in M'Naghten's case", now over a hundred years old. It will be recalled that in 1843 M'Naghten was tried for the murder of the secretary to Britain's Prime Minister, Sir Robert Peel, but was acquitted when he was declared insane.⁴ So unpopular was the verdict that, following a debate on the subject, the House of Lords decided to ask the opinion of fifteen judges upon the law relating to the insanity defence. The answers of fourteen of the judges,⁵ generally known as the "Rules in M'Naghten's Case", held in brief that the correct test was the ability of the accused to distinguish between right and wrong with respect to the particular act with which he was charged.⁶ That opinion has since

* Section 19 of the Criminal Code of Canada reads as follows:

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

"2. A person labouring under specific delusions, but in other respects sane, shall not be acquitted on the ground of insanity, under the provisions hereinafter contained, unless the delusions caused him to believe in the existence of some state of things which, if it existed, would justify or excuse his act or omission.

"3. Every one shall be presumed to be sane at the time of doing or omitting to do any act until the contrary is proved."

¹ (1946), 54 Can. Med. Ass'n. Journal 383.

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³ *Op. cit.*, p. 622.

⁴ *R. v. M'Naghten*, 10 Cl. & F. 200. The name is spelled variously, e.g. McNaughton, MacNaughten, etc.

⁵ Maule J. disagreed in part with the other fourteen judges and gave a separate set of answers: see *infra* footnote 8.

⁶ That is the essence of the test. The Rules, which were written at some length, are summarized in s.19 in 135 words. Two differences between s.19 and the Rules are worth noting: (a) In the last part of sub-s. 1 the word "and" (immediately preceding the words "of knowing") is used instead of "or". However, it has been held that "and" should be construed as "or" for

been followed in England and Canada and (with minor exceptions) has been adopted in the majority of the American states.⁷

The M'Naghten Formula has been criticized on several grounds, but principally because it treats criminal responsibility as a matter of intelligence and not of the will and emotions.⁸ Psychiatrists point out that insanity attacks the will and emotions more frequently than the intellectual powers and that insane people, although capable of discerning right from wrong, may nevertheless be deprived of all control over their actions by reason of impulses beyond their powers to resist.⁹ Such a situation is not covered by the M'Naghten Rules, and for that more than any other reason it is claimed they are not in keeping with modern medical science. It should be noted, however — and this fact often is overlooked — that the Rules consisted of the judges' answers to a set of specific questions concerned with *delusional* insanity and that the question of insane or irresistible impulse was not put to them for their opinion.

Unsuccessful efforts to amend and add to the Rules have been made from time to time. Of particular importance was the recommendation of Lord Atkin's Committee in England in 1923, which came about in the following circumstances:

the purpose of that sub-section, — Crankshaw's *Crim. Code of Canada* (6th ed.), p. 26; Tremear's *Crim. Code* (5th ed.), p. 56; *R. v. Jeanotte*, [1932] 2 W.W.R. 283; *R. v. Cracknell*, [1931] 4 D.L.R. 657: (b) As to *degree of proof*, the Rules used the words "it must be clearly proved", whereas sub-s. 3 provides "until the contrary is proved". In view of the latter wording it is sufficient if the insanity is proved to the reasonable satisfaction of the jury: see *infra* footnote 29.

⁷ "The opinion of the judges of England which followed M'Naghten's acquittal on the ground of insanity, is the most famous and fundamental statement of the English Law of insanity as it exists to-day in England and in most of the States of the Union" — Glueck: *Mental Disorder and the Criminal Law* (U.S. 1925), p. 124. See *ibid.*, pp. 161, 168, and Weihofen: *Insanity as a Defence in Criminal Law* (U.S. 1933), pp. 2-3, 17, and *infra* footnote 26.

⁸ For further criticism from the medical side see *infra*. From a legal viewpoint it is contended *inter alia* that the language of the Rules left too much to conjecture and judicial construction. Moreover that the judges should not have been obliged to lay down the law extra-judicially without hearing evidence and argument of counsel. This in effect was Maule J.'s reason for differing with his colleagues.

⁹ "That there are cases in which mental unsoundness results in impulsions which are sometimes quite uncontrollable, is testified to by all psychiatrists" (Weihofen: *Insanity as a Defence in Criminal Law*, p. 45). "That there are such impulses is to-day established in psychiatry" (Glueck: *Mental Disorder and the Criminal Law* (1925), pp. 235-6). "It is possible that will may be hopelessly erratic, decayed, and imbecile, while the intelligence still functions clearly. This is well known to be so in the early stages of general paralysis of the insane" (Marjoribanks: *For the Defence* (1929), p. 378). See also Piersol: *Clinics*, Vol. I, p. 1367 (1943, J. B. Lippincott Co.); Tremear's *Crim. Code* (5th ed.), p. 57; Crankshaw's *Crim. Code of Can.* (6th ed.), p. 30 and citations.

Shortly after the first World War several exceptionally brutal murders were committed by English ex-servicemen. Doctors testified that the men's nerves had been shattered by the effects of modern warfare and that they were insane; but as they were capable of distinguishing right from wrong they were sentenced to death. In one of the cases — the *cause célèbre* of *Rex v. True* — the Home Secretary granted a reprieve on the ground that the prisoner was mentally unfit to undergo the sentence.¹⁰ This aroused public opinion and finally Lord Birkenhead, then Lord Chancellor, appointed a committee of eminent jurists under Lord Justice Atkin to consider what, if any, changes should be made in the law.¹¹ The Committee invited medical experts and boards to advance their opinions and, supported by the British Medical Association, it recommended the recognition of irresistible impulse as a defence. The Medical Association had advised that unsoundness of mind could no longer be regarded as essentially a disorder of the intellectual faculties, that it was something much more profoundly related to the whole organism — “a morbid change in the emotional and instinctive activities, with or without intellectual derangement”. The Committee in its Report agreed that “the M’Naghten Formula is not logically sufficient” and concluded:

1. It should be recognized that a person charged criminally with an offence is irresponsible for his act when the act is committed under an impulse which the prisoner was, by mental disease, in substance, deprived of any power to resist. It may require legislation to bring this rule into effect.

2. Save as above, the Rules in M’Naghten’s case should be maintained.

In 1924 that recommendation was referred to twelve High Court judges for their opinion. Ten of the twelve judges advised against admitting any such defence and the law remained unchanged.¹²

It is true that a number of distinguished jurists have criticized the Rules as being inadequate, that trial court judges sometimes give them an over-liberal construction and that on several occasions the question of irresistible impulse has been left to the jury.¹³ But the English Court of Appeal has held

¹⁰ *R. v. True* (1922), 16 C.A.R. 164 and see *infra* footnote 39.

¹¹ The Committee convened in July 1922 and published its report on Nov. 1st, 1923. It consisted of Lord Atkin (Chairman), Sir E. Marshall-Hall, Sir Ernest Pollock, Sir Herbert Stephen, Sir Archibald Bodkin, Sir Ernest Blackwell, Sir Richard Muir, Sir E. Troup and Sir Leslie Scott.

¹² Kenny: *Outlines of Criminal Law* (1936), p. 63.

¹³ The unanimous opinion and recommendation of the distinguished jurists who formed the Atkin Committee have been quoted above. Marshall-Hall’s views are set forth at greater length by Marjoribanks in *For the Defence* (1929), pp. 377 *et seq.* In *R. v. True* (*supra*), *R. v. Holt* (1920),

repeatedly that the Rules have not relaxed and must not be loosely construed. In *True's* case Lord Hewart L.C.J., in rendering the judgment of the Court of Appeal, said in part:¹⁴

It is conceivable that the rule founded upon the answers given by the learned judges in *M'Naghten's* case may on some future occasion be further considered . . . but no such consideration is required in the present case. It is enough to say that in the view of this Court there is no foundation for the suggestion that the rule derived from *M'Naghten's* case has been in any sense relaxed.

Similar decisions subsequently were rendered by the Court of Appeal in the cases of *Kopsch* and *Flavell*.¹⁵ In 1937, Lord Hewart cleared up any doubts which may have existed on the matter when he wrote: "The well-settled law derived from the answers given by the judges in *M'Naghten's* case remains absolutely unimpaired".¹⁶ In September 1946, in the English case of *Heath, Morris J.*, after reading the *M'Naghten* Formula to the jury, warned them that the law of insanity was "not to become a refuge for those who could not challenge a charge made against them".¹⁷

Canadian courts also have applied the *M'Naghten* Formula and have rejected the defence of irresistible impulse, as indeed they must if they follow the text of section 19.¹⁸ Thus in the widely cited Ontario case of *Rex v. Creighton*¹⁹ Riddell J. said: "The law says to men who say they are afflicted with irresistible

15 C.A.R. 10, *R. v. Fryer* (1915), 24 Cox C. C. 403 and *R. v. Gill* (1883), 2 Ham. & Godkin Leg. Med. 248, the trial judges (McCardie, Greer, Bray and Kay JJ. respectively) went outside the Rules and left the question of irresistible impulse to the juries. McCardie J. said that in his view of the law "even if the prisoner knew the physical nature of the act and that it was morally wrong and punishable by law" he was entitled to acquittal if, through mental disease, he was "deprived of the power of controlling his actions at the same time". See also *R. v. Hay* (1911), 22 Cox C. C. 286 and *infra* footnote 25. In *R. v. Jolly* (1919), 83 J. P. 296, it was held that epilepsy sufficient to deprive the accused of all control over his actions at the time of the crime was a sufficient defence. But it should be noted that an act committed during unconscious automatism due to epilepsy is distinguishable from irresistible impulse and is covered by the *M'Naghten* Formula (*R. v. Perry* (1919), 14 C. A. R. 48, at p. 55).

¹⁴ Ref. *supra* footnote 10.

¹⁵ *R. v. Kopsch* (1925), 19 C. A. R. 50; *R. v. Flavell* (1926), 19 C. A. R. 141.

¹⁶ Lord Hewart: Not Without Prejudice (Hutchinson & Co., London), p. 208.

¹⁷ Central Criminal Ct.: *The Times* London, Sept. 27th, 1946. Writing about this case in the *British Medical Journal* (Oct. 12th, 1946) T. Martin Cuthbert refers to the "inadequacy of the *M'Naghten* Rules". It should be noted, however, that Heath's defence was not based upon irresistible impulse but rather on "moral" and "partial" insanity.

¹⁸ E.g. *R. v. Riel* (1885), 1 Terr. L. R. 23 in which leave to appeal was refused by the Privy Council; *R. v. Jessamine*, [1912] 1 D. L. R. 285.

¹⁹ (1908), 14 C. C. C. 349: see also *R. v. Jessamine* (*supra*).

impulses: 'If you cannot resist an impulse in any other way, we will hang a rope in front of your eyes and perhaps that will help'".

The situation then is a curious one. On the one hand we have the psychiatrists stating emphatically that a conative form of insanity (affecting the will and emotions) may exist alongside an unimpaired intellect: in other words, that a sane intellect may be governed by an insane will. On the other hand, we have a law dating back to 1843 which refuses to recognize this modern concept of mental illness and irresponsibility.²⁰ What is the reason for this apparent conflict of views?

Probably the principal reason is the difficulty of proof which the defence of irresistible impulse would involve.²¹ In the same connection it is contended that to recognize the defence would be dangerous to society and might provide criminals with an easy escape from justice.²² However, it must be admitted that such arguments lose considerable weight once it is conceded that insanity capable of destroying the power of conscious volition can exist alongside a knowledge of right and wrong. Difficulties of proof already abound in applying the present law and there should be no hesitation in meeting additional problems if the situation demands it. Moreover, any possible danger to society would lie, not in the new law itself, but in its administration.

A strong argument in favour of the irresistible impulse defence is based upon the elementary legal principle that for an act to constitute a crime it must be voluntary. This has led authorities such as Sir Henry Theobald, K.C.²³ (and long before him, Sir James Stephen²⁴) to state that "if there is irresistible impulse there is no criminal responsibility". Again it should be

²⁰ The situation is by no means a new one, but the medical viewpoint presumably gains weight with the passage of time and increase in the knowledge of mental disease.

²¹ Doctors are not justified in supporting it "unless they are prepared to draw a clear distinction between impulses which are 'unresisted' and those which are 'irresistible' " — Taylor's Principles and Practice of Med. Juris. (9th ed.), Vol. I, p. 817. See also Glaister: Medical Jurisprudence and Toxicology (7th ed.), p. 416.

²² And in most cases where insanity is pleaded the prisoner is on trial for a capital offence.

²³ Theobald: The Law relating to Lunacy (1924), p. 243.

²⁴ Stephen pointed out that "no involuntary action, whatever effects it may produce, amounts to a crime by the law of England" (History of the Criminal Law of England, Vol. II, p. 100). He contended that the M'Naghten Formula is sufficiently broad to include the irresistible impulse doctrine: "Knowledge and power are the constituent elements of all voluntary action, and if either is seriously impaired, the other is disabled" (*ibid.*, p. 171). In 1878 Stephen included a modified form of the irresistible impulse test in the draft he prepared of the proposed (but never enacted) criminal code of England. The commissioners to whom the draft was referred struck out that provision.

stressed that the judges who drafted the M'Naghten Rules were not questioned on the subject of impulse and assumed they were dealing with a class of person free from constraint, whether physical or mental. It follows that an amendment to the law would not require the abolition of the Rules nor the repeal of section 19, but only an added provision to cover a situation not contemplated at the outset.

The irresistible impulse defence has been adopted in some seventeen jurisdictions in the United States,²⁵ although the majority of states so far have adhered to the right and wrong rule as the sole test of insanity.²⁶ At least one state has no universal test,²⁷ while one or more others appear to have steered a middle course. In Pennsylvania, for instance, it has been held that the irresistible impulse doctrine "can be recognized only in the clearest cases. It ought to have been shown to have been habitual, or at least to have evinced itself in more than a single instance."²⁸ This requirement of ample proof should not be forgotten in the event of an amendment to section 19. At present, sub-section 3 provides that everyone is presumed to be sane "until the contrary is proved", and it is sufficient if the insanity is proved to "the reasonable satisfaction of the jury". It is a misdirection to instruct the jury that it must be proved "beyond all reasonable doubt".²⁹ However, if the irresistible impulse defence were to be admitted, it would be highly desirable to provide that the defence must be proved beyond all reasonable doubt. Juries could then be directed accordingly.

²⁵ See Weihofen: *Insanity as a Defence in Criminal Law* (U.S. 1933), pp. 64 *et seq.* The defence has been admitted by the U. S. Supreme Court (*Davis v. U.S.* (1895), 160 U.S. 469, at p. 485). It is of American origin; e.g. *State v. Thompson* (1834), Wright's Ohio Repts. 617. Irresistible impulse should be distinguished from *emotional* or *moral* insanity (22 Corpus Juris Secundum s. 61). The doctrine is set forth by Somerville J. in the widely cited case of *Parsons v. The State* (1886), 81 Ala. 577. He held that a person who was insane by reason of a disease of the mind, although capable of distinguishing right from wrong, was not legally responsible "(1) if, by reason of the duress of such mental disease, he had so far lost the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed; (2) and if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely".

²⁶ *Ibid.*, pp. 64 *et seq.* However, American law on this subject admittedly is confused. At least one authority blames the confusion mostly on the M'Naghten Formula, which, he points out, has been cited with approval in the majority of the states. He contends that the formula "left so much to conjecture and judicial construction that in America it has done more than any other one agency, in our belief, to confuse the law of insanity" — Glueck: *Mental Disorder and the Criminal Law* (1925), p. 186.

²⁷ New Hampshire.

²⁸ Gibson C. J. in *Commonwealth v. Mosler* (1846), 4 Pa. St. 264. This case appears still to be the leading authority in Pennsylvania.

²⁹ *Smythe v. R.*, [1941] 1 D. L. R. 497; *Clark v. R.* (1921), 59 D. L. R. 121; *R. v. Gibbons* (1946), 86 C. C. C. 20 (Ont. C. A.).

It should not be assumed that medical criticism of the M'Naghten Formula is confined to the irresistible impulse question, although that is the chief ground for complaint and, in the writer's submission, the only one meriting any consideration from the point of view of amendment. It has been contended, for example, that the Rules should be repealed *in toto* and that the responsibility of the accused should be left as a question of fact to be determined by the jury on the merits of each particular case.³⁰ Other medical authorities claim that the average jury is incapable of trying the insanity issue, that its function should be restricted to deciding whether or not the crime charged had been committed. If it had, then the insanity question should be determined by a government board of medical experts, unhampered by legal tests.³¹ Some psychiatrists favour the Briggs Law of Massachusetts, which provided for pre-trial mental examinations by a state department of all prisoners charged with murder and certain other offences.³² Others would simplify the test by holding that the accused is either certifiably insane or responsible for his crime.³³ There have been many other and more extreme suggestions to which it is unnecessary to refer. Perhaps the medical attitude was neatly summed up by Dr. J. A. McCluskie in a recent number of the British Medical Journal when he asked, "Is it not time somebody turned the cold spray on the so-called M'Naghten Rules?"³⁴

Such attacks upon the law are based partly upon the erroneous belief that the M'Naghten Formula disregarded what unfortunately has come to be called "insanity in the medical sense". The exact reverse is the case. The judges who drafted the Rules were aware that insanity is a mental disease, but that it is a disease of many gradations, the lesser of which should not

³⁰ Such was the recommendation of the Medico-Psychological Ass'n. to the Atkin Committee. In effect it advocated the adoption of the New Hampshire law, and was rejected by the committee.

³¹ *E.g.* G. H. Stevenson, 54 Can. Med. Ass'n. Journal 622; William A. White, 4 Journal of the Institute of Crim. Law & Criminology (U.S. 1913-14), p. 107.

³² *E.g.* C. R. Crawford, 55 Can. Med. Ass'n. Journal 520. The "Briggs Law" was enacted in 1921 and has been amended several times.

³³ *E.g.* D. Stafford-Clark, Brit. Med. Journal, Nov. 9th, 1946, p. 627. However, it is well settled that a person may be guilty of a crime though he may be a certifiable lunatic — Theobald: The Law relating to Lunacy, p. 244; and see 22 Corpus Juris Secundum s. 56.

³⁴ Brit. Med. Journal, Oct. 12th, 1946, pp. 555-556. The right and wrong test of the formula also has been criticised on the ground that it does not always enable a distinction to be made between the insane homicide and the sane criminal: see Taylor's Principles and Practice of Med. Juris. (9th ed.), Vol. I, p. 809.

be allowed to constitute a defence.³⁵ They were obliged, therefore, to draw a line somewhere on the scale to separate those classes of insanity which render a person irresponsible for his actions from those which do not. The line may have been drawn imperfectly, but to remove it entirely, thereby abolishing all legal tests, would be little short of catastrophic. As to substituting a board of experts for the jury, our medical friends do not appreciate that they are advocating the violation of a fundamental principle of our constitution. Nor do they realize that the jury's function is not simply to decide whether or not the accused was insane. The real question for their consideration is whether or not the mental element required by law was present, and for that purpose it is essential that all witnesses, including doctors, be examined in their presence. Finally, doctors incline to forget that the question of responsibility is a legal one and that according to law insane persons (including certifiable lunatics) may be criminally responsible.³⁶ It follows that an opinion by a board of medical experts that the accused was "insane" has little significance in law, unless that opinion was reached in conformity with the legal tests of irresponsibility.

The foregoing serves to emphasize that for the safety of the community the M'Naghten Rules should remain in force, and that the only question is whether or not irresistible impulse should be admitted as an *additional* defence. In 1924 Sir Henry Theobald wrote as follows:

Law and medicine must work together; the tendency of the one to follow the beaten path and to shrink from novel ideas must be enlarged by the knowledge the doctor acquires from the study of mental disease in the asylum, and, on the other hand, the leaning of the medical profession to speculative theories of psychology and doubtful metaphysics must be corrected by the accuracy and sound sense of the law and its interest in protecting the community at large.³⁷

The M'Naghten Rules, as summarized in section 19, were drafted before the profession of psychiatry was born and it cannot be denied that knowledge of mental disease has advanced considerably since that time. Is it logical, then, to adhere rigidly to the law of 1843, when mental specialists tell us unreservedly that insanity may and often does destroy freedom of will? First-hand medical opinion on that feature would readily be available if a

³⁵ The Rules speak for themselves; *e.g.* the judges used the words " . . . labouring under such a defect of reason, from disease of the mind, as not to know"

³⁶ See *supra* footnote 33. But as to trial and punishment see *infra* footnote 39.

³⁷ Theobald: The Law relating to Lunacy, p. 236.

conference were arranged between committees of the Medical and Bar Associations, as proposed by Dr. Stevenson. Such a conference would provide an opportunity to explore the situation from both medical and legal points of view and should serve to promote a better understanding between the two professions on this vexed question. One thing is clear, namely that any amendment providing for the defence of irresistible impulse (assuming such an amendment were contemplated) should be drafted in strict and unambiguous terms and, as suggested above, the defence should be expressly subject to proof beyond all reasonable doubt. As McCardie J. said in *True's* case,³⁸ "it would be unwise to allow any man to think he was saved from the need of controlling his actions because he was able to say to the jury 'from mental disease I could not control myself' "

In conclusion, it should be recalled that it is customary to extend the royal prerogative of mercy to a convicted prisoner if, by reason of insanity, he is unfit to undergo the sentence. The test in such cases is mental capacity to understand the nature of the proceedings and the purpose of the punishment to be inflicted, and the M'Naghten Formula has no application.³⁹ Thus it has happened that condemned murderers, whose insanity defences have fallen short of the legal requirements, nevertheless have been granted reprieves and have been sent to institutions.⁴⁰ Such procedure should remove any risk of injustice which otherwise might result as long as section 19 remains unamended. But if we admit this section to be defective, it is at once obvious that the exercise of the royal prerogative is not the proper remedy.

³⁸ Ref. *supra* footnote 10. Nevertheless he left the question of irresistible impulse to the jury (*supra* footnote 13).

³⁹ Although an insane person may be legally responsible for a crime, "no person can be rightly tried, sentenced or executed while insane" (*R. v. Leys* (1910), 16 O. W. R. 544). As to trial, see s. 967 Crim. Code. The same principle applies in England and the U.S.A. "Everyone would revolt from dragging a gibbering maniac to the gallows" (Atkin Committee, *supra*). "The thorough enquiry made by doctors in such cases affords an effective review of a jury's verdict if it be against a prisoner" (Kenny: *Outlines of Criminal Law* (1936), p. 68, citing Troup, Home Office, p. 127). The prisoner must have "a sufficient mind to know any facts which might exist which would make his punishment unjust or unlawful, and sufficient of intelligence to convey such information to his attorney or the court" (*People v. Geary* (1921), 298 Ill. 236).

⁴⁰ E.g. *R. v. True* (*supra*), where the Home Secretary acted under the statutory powers conferred upon him by s. 2 (4), Criminal Lunatics Act, 1884; *R. v. Taupier* (1930, Metis Beach murder, unreported).