

INSANITY AS A DEFENCE FOR CRIME: AN ANALYSIS OF REPLIES TO A QUESTIONNAIRE

G. H. STEVENSON *

London, Ont.

In order to ascertain the extent to which psychiatric opinion across Canada might agree or disagree with the opinions expressed by the writer in his paper, "Insanity as a Defence for Crime: The Psychiatric Viewpoint",¹ a preliminary draft of it was sent to more than 100 Canadian psychiatrists. Each psychiatrist was asked to make such general comments as he might care to, but in addition he was asked to answer eight questions based on the fundamental points in the paper.

Replies were received from 86 individual psychiatrists, although some replies were group opinions, so that the views expressed appear to represent a large cross-section of psychiatric opinion.

Not all questions were answered by each person replying, which accounts for minor variations in the totals for each question.

Before listing the questions it might be well to state that some criticism may be offered on the ground that some of the questions appear to exceed the proper scope of the psychiatrists' jurisdiction. Certainly we have no desire to infringe on matters which are no concern of psychiatry. But the chief discussion involves two problems, the relationship of the psychiatrist to the law, and the relationship of the psychiatrist to court procedure. In both fields the psychiatrist desires only to contribute of his scientific knowledge to assist the court in its deliberations so that the best interests of society (including the accused) may be served.

The questions asked and the answers received are listed below; they are followed by an analysis of the replies with such comments from them as may be helpful to the discussion.

	YES	NO
1. Are you, as a psychiatrist, satisfied with the M'Naghten Rules as embodied in section 19 of the Criminal Code of Canada?.....	8	78
2. Would you be satisfied with them if the "irresistible impulse" feature were added, as recommended by Mr. Meredith? ²	2	84

* G. H. Stevenson, M.D., F.R.S.C., is Professor of Psychiatry at the University of Western Ontario and Superintendent of the Ontario Hospital at London.

¹ (1947), 25 Can. Bar Rev. 731.

² See W. C. J. Meredith: Insanity as a Criminal Defence: A Conflict of Views (1947), 25 Can. Bar Rev. 251.

3. If you are not satisfied with either 1 or 2, do you approve the suggestion made in the attached paper (Insanity as a Criminal Defence: The Psychiatric Viewpoint) that the presence of an actual psychosis or actual mental deficiency be the criterion for establishing legal irresponsibility?.....	63	21
4. If you are not satisfied with 1, 2, or 3, what would be your recommendation?.....	—	—
5. Do you favour the appointment of an independent Board of qualified psychiatrists for the psychiatric examination of persons accused of serious crime?.....	80	2
6. Do you agree with the suggestion that the psychiatric reports be given to the trial judge, rather than as evidence in open court?.....	62	18
7. Do you agree with the suggestion that juries should determine only if the accused person actually committed the crime with which he is charged?.....	63	16
8. Do you agree with the suggestion that a trial judge should not be required to impose the death sentence if the accused is convicted of murder, but should have authority to impose an optional sentence, if in his opinion the mental condition of the accused, or other circumstances, appear to warrant other disposal?.....	65	15

It will be seen that questions 1 to 4 are related to the M'Naghten Rules and their modification or replacement, whereas questions 5 to 8 are concerned with court procedures. The questions will be discussed in the order in which they appear.

Question 1. *Are you, as a psychiatrist, satisfied with the M'Naghten Rules as embodied in section 19 of the Criminal Code?* Yes 8, No 78.

It is evident that Canadian psychiatrists are overwhelmingly dissatisfied with the law as it stands. Those answering in the negative make few qualifying comments. The 8 who answered in the affirmative indicate that they have had little difficulty giving evidence under section 19, or that trial judges show more latitude to psychiatric evidence than formerly. Other affirmative comments indicate a belief that fundamental rights of the accused would be encroached on if the law were modified, or that psychiatrists have no right to express views on legal matters. One who answered in the affirmative added the comment that he "would be more satisfied if [section 19] were modified" and another volunteered that section 19 "is not perfect".

Question 2. *Would you be satisfied with them (the M'Naghten Rules) if the "irresistible impulse" feature were added, as recommended by Mr. Meredith?* Yes 2, No 84.

The replies here are almost unanimously opposed to this suggestion, with only 2 affirmative votes. Psychiatrists become rather strongly vocal in their opposition, for the reasons stated in my previous paper. Some comments are abbreviated as follows: "This feature would almost certainly lead to endless abuses", "irresistible impulse a dangerous loophole", "probably complicate, confuse and prolong the evidence", "would be an utterly mischievous feature", "lead to untold abuses", "difficult enough [to give evidence] without adding irresistible impulse", "irresistible impulse, if added, would probably become the standard defence of every murderer", "would be much worse than present rules", "I know of no way to distinguish between irresistible and unresisted", "I doubt the ability of anyone to draw a very fine line between the unresisted and the irresistible". One of the two affirmative answers is briefly, "It would be an improvement, I think". The same correspondent expresses objection to the suggestion in question 3 by saying that "there would have to be legal tests of psychosis or deficiency". This should not present any actual difficulty because as in all other types of medical evidence full weight is given to the physician's clinical diagnosis and the law does not insist on legal confirmation. The only other affirmative reply quoted with approval the report of the Atkin Committee in Great Britain (1923) in which the irresistible impulse feature was recommended. He goes on, "I believe that legal responsibility can hold within the framework of an actual psychosis or actual mental deficiency". This very conservative position has few supporters among those who replied. The same psychiatrist makes an alternative recommendation: "Let the jury decide the fact of the crime committed. Let society decide through a properly constituted body, including psychiatrists, what shall be done with the convicted person". In this position he is not far from the 84 who voted against the irresistible impulse feature, leaving only one psychiatrist who favours it unreservedly.

Question 3. *If you are not satisfied with either 1 or 2, do you approve the suggestion made in the attached paper (Insanity as a Defence for Crime: The Psychiatric Viewpoint) that the presence of an actual psychosis or actual mental deficiency be the criterion for establishing legal irresponsibility?* Yes 63, No 21.

Although there is close to unanimity in opposition to the present M'Naghten Rules and the proposed irresistible impulse addition to them, there is by no means unanimous approval of the writer's suggestion. True, 63 psychiatrists approve it, but

the remaining 21 have other views, 8 of them preferring the law as it stands, 2 of them supporting the irresistible impulse feature and the remaining 11 holding other ideas. Some of these 11 do not so much oppose the writer's view as wish to make sure that there would be no hard and fast line between psychosis and sanity and that borderline psychopathic states, limited intelligence, epileptic personality change and related conditions would be taken into consideration in the disposal of charges. (The writer felt he had taken care of these borderline conditions in his recommendations in question 8.) One comment in this connection is as follows: "Psychosis or mental deficiency might be *a* criterion, but not *the* criterion. The establishment of an actual psychosis or mental defect as the criterion for legal irresponsibility is a big step forward, but a further step is needed" A few expressed the view that responsibility could exist in the early stages of a psychosis and wanted to make sure that the act complained of was the result of a psychosis having developed. One feared that the writer was seeking to undermine Magna Carta. Another, who gave a negative answer to questions 1, 2 and 3, states that "it is too difficult to draw a line between psychotic and non-psychotic conditions". This same correspondent, writing on behalf of a group, expresses the view that a complete psychiatric report should be given to the trial judge after the jury has determined if the accused had or had not committed the act with which he is charged. It would appear therefore that he and his associates are not so much opposed to the writer's view as they are concerned with full and complete psychiatric consideration. Another correspondent who voted in the negative found no fault with the suggestion but urged discussion between psychiatrists and the legal profession. Still another who voted against the suggestion added the comment that it "would be treading on dangerous ground". However, he also voted against questions 1 and 2 and had no alternative recommendation, so that it is difficult to know just where he stands. Another voted negatively because he holds the opinion that "there are no clear-cut psychiatric entities. They have no real existence but represent abstractions of our own creation." This same commentator voted in the negative to both 1 and 2, as well as to 3, and likewise has no definite recommendations other than "long term study of the problems involved". The problems raised, he says, "are pressing for a better solution than the M'Naghten Rules and present court procedure". Another of the negative voters states, "I would be in complete agreement with (3) if it were slightly modified so that the psychosis or mental defect were of such a

degree that even if he had not committed the crime, the individual could be confined [to a mental hospital]." It appears therefore that, excluding 10 of the 21 who voted no to question 3 and who preferred 1 or 2, the remaining 11 were not so much opposed to the writer's suggestion as they feel it needs modification still further to ensure full consideration of all the psychiatric factors. In expressing agreement with the proposals as outlined in this paper, one of our French-speaking colleagues makes the following interesting comment: "L'existence d'une psychose ou d'un état de déficit mental serait certainement un meilleur critère d'irresponsabilité. Ceci serait pratiquement l'équivalent de l'article 64 du code pénal français qui est ainsi conçu: 'Il n'y a ni crime ni délit si le prévenu était en état de démence au moment de l'action'. Le mot 'démence' est évidemment pris ici dans un sens large, synonyme de maladie mentale et cette interprétation est acceptée par les juristes français."

Question 4. *If you are not satisfied with 1, 2, or 3, what would be your recommendation?*

This question cannot, of course, be answered by yes or no, but was inserted to get additional points of view. The few significant replies have already been discussed in the comments on questions 1, 2 and 3, and do not need to be repeated here. No clear-cut alternatives to 1, 2 or 3 are offered by any of the commentators, but comments under 4 tend merely to modify or add to the main suggestions of questions 1, 2 and 3. It appears therefore that fewer than 21 psychiatrists oppose the writer's suggestion, that an actual psychosis or actual mental deficiency be the criterion for the determination of legal irresponsibility, and that in addition to the 63 who voted in favour of the suggestion, at least several more favour it with certain modifications.

Question 5. *Do you favour the appointment of an independent Board of qualified psychiatrists for the psychiatric examination of persons accused of serious crime? Yes 80, No 2.*

This question is the first of the second group of questions, which is concerned with the place of the psychiatrist in court procedure. This question is answered almost unanimously in the affirmative. Psychiatrists very much dislike being called "for the Crown" or "for the Defence". They are ashamed of the all too frequent appearance of seemingly contradictory psychiatric evidence. They believe that only recognized specialists (certified as such by the Royal College of Physicians

and Surgeons) should give psychiatric evidence in court and that those who are called upon to give evidence should be selected from a panel of such specialists, who have the confidence of the courts and of their colleagues. Of the two psychiatrists in opposition, one expresses the opinion that the defence should be free to call anyone as a psychiatric witness, irrespective of the standing and opinions of the independent Board. The other dissenting opinion is offered on the assumption that the Briggs Law in Massachusetts, which provides for special boards of psychiatrists, has not been satisfactory. The writer can only state that the Briggs Law is still in effect in Massachusetts after many years of use and he is credibly informed that it is regarded very favourably in that state. A number of correspondents urged better facilities for making psychiatric examinations of accused persons.

Question 6. *Do you agree with the suggestion that the psychiatric reports be given to the trial judge, rather than as evidence in open court?* Yes 62, No 18.

Questions 6 and 7 are closely related to each other and involve a radical proposal. It is suggested that the psychiatric reports be given to the judge to help him with his assessment of the psychological factors in the case, leaving to the jury the problem of deciding only if the accused actually committed the crime with which he is charged. This suggestion, if accepted, would imply that insanity should no longer be offered as a defence for crime, but the mental condition of the accused would be taken into consideration in deciding the penalty or social treatment which the judge might decide would be appropriate. This proposal is made because the writer (and 61 other psychiatrists) consider that psychiatric technicalities cannot properly be presented from the witness box, nor can juries adequately evaluate the psychiatric aspects of a case, especially where apparently contradictory evidence is offered. It is our considered opinion that this proposal need not be thought of as an infringement on the rights of the accused, if the courts are less concerned with the infliction of a penalty than with a satisfactory social solution to the matter. It will be noted that 18 psychiatrists voted against the proposal, although from the comments they make it is evident that they are not all actually opposed to the proposal but prefer some modification of it. Two of the comments of those who voted in the negative are as follows: "prefer a written report for both crown and defence, subject to examination and cross-examination, the jury deciding only if the accused committed the act", "present

report to court in advance of the trial and subject to examination". Another of those who voted in the affirmative made the following interesting suggestion, "suggest the judge should be allowed to see the psychiatrists' report before hearing evidence". Other opinions are: "a preliminary trial without a jury, to decide not only the condition at the time of the crime but also his fitness to stand trial", "subject to review by opposing counsel", "or better still to a board of review as in the army", "more useful after the jury has brought in its verdict", "if psychotic or defective, report should be accepted and case go no further", "reports should be sent in advance to crown attorney and defence counsel, the judge to rule if the reports should be presented as evidence in open court", "the trial judge should be allowed to call the psychiatrists in open court if he is not satisfied". It appears therefore that psychiatrists in a considerable majority prefer that written reports be given to the judge, although a fair number suggest that such reports also be available to the opposing counsel. Taken in conjunction with the replies to question 7, there is a close correlation in complementary opinions.

Question 7. *Do you agree with the suggestion that juries should determine only if the accused actually committed the crime with which he is charged?* Yes 63, No 16.

The voting both in the affirmative and negative is almost identical with the voting on question 6, as might be expected. There is relatively little in the way of new discussion or new points of view in the answers to this question. A few comments follow: "the jury's responsibility has been fully discharged when it has determined this point [the actual commission of the act]", "psychiatric findings [in court evidence] have a disturbing influence on juries and thus interfere with the verdict", "decision should be made on the available evidence in every case regardless of responsibility. Inability to instruct counsel should not be a bar to completion of the trial." A negative voter recommends, "let the jury decide first if he committed the crime, then decide his mental condition".

Question 8. *Do you agree with the suggestion that a trial judge should not be required to impose the death sentence if the accused is convicted of murder, but should have authority to impose an optional sentence, if in his opinion the mental condition of the accused, or other circumstances, appear to warrant other disposal?* Yes 65, No 15.

The reasons for asking this question are outlined in the body of my previous paper. There are borderline psychiatric conditions, not amounting to actual psychosis or mental deficiency, which, while not being the equivalent of legal irresponsibility, nevertheless modify or limit the responsibility of the accused. It is felt, too, that compulsory imposition of the death penalty is a remnant of an earlier and harsher era, completely vindictive and permitting no correction of a possible judicial error nor social treatment of the convicted person. The primitive demand for blood sacrifice, and the psychological need of scapegoats for personal and tribal guilt, may be factors in the compulsory infliction of the death penalty. Psychiatrists are not asking for the abolition of the death penalty but, since they have considerable understanding of the psychological strengths and weaknesses of people, they feel that the trial judge should be allowed to use his judgment as to the severity and type of social treatment that should be imposed. Of the 80 who voted on this question, only 15 opposed the suggestion that the trial judge have this privilege. Some of their comments indicate not so much opposition as modification, for example, "if your other observations were in effect I hardly see where the optional sentence would be required". Others who opposed the suggestion feared it would put an unfair responsibility on the trial judge, as follows, "if he [the judge] had a choice, it could conceivably lay him open to allegations of partiality".

Although psychiatrists voted 65 to 15 for the proposal of alternative sentences, they are by no means in favour of the complete abolition of the death sentence. A supplementary question, asked only to ascertain the reaction of the psychiatrists to the retention or abolition of the death sentence, revealed that 49 are in favour of its retention and 20 are in favour of its abolition.

But little further comment on the replies to the questionnaire is needed. They indicate the extent to which the writer's views as presented in "Insanity as a Defence for Crime: The Psychiatric Viewpoint" are shared by other Canadian psychiatrists. They also introduce into the discussion other points of view, making a quite comprehensive survey of psychiatric opinion on the relationship of psychiatry to criminology as it pertains to the law and court procedure. The writer desires to thank all those who participated in this inquiry and again expresses his appreciation to the Editor for permission to present these views to the members of the legal profession.