CORRESPONDENCE

Insanity as a Defence for Crime

THE EDITOR,
THE CANADIAN BAR REVIEW

I have read with great interest the article by Mr. W. C. J. Meredith, K.C., on "Insanity as a Criminal Defence: A Conflict of Views" in the March 1947 issue of the Canadian Bar Review, and his previous article on the same subject, entitled "Irresistible Impulse and Crime", in the Canadian Medical Association Journal (54, 384, 1946).

It is one of my duties to deal with this subject, though very briefly, in my lectures at McGill University on Medical Jurisprudence and Toxicology and the views which I express are in complete agreement with those of Mr. Meredith. Quite frankly, though the M'Naghten Rules have their limitations, I cannot agree with Dr. G. H. Stevenson's suggestions, supported though they are by the advances in psychiatry. In one of his articles on the subject (Canadian Bar Review for August-September, 1947, p. 738) Dr. Stevenson describes his proposals as "rather radical". In my opinion, they are too radical and, overlooking as they do certain legal aspects, would most likely tend to prevent, rather than assist, the administration of justice.

Incidentally, in this paper by Dr. Stevenson, Mr. Meredith is credited with advocating "that the M'Naghten Rules be modified by the addition of the irresistible impulse feature". This, I have the impression, is a misinterpretation. As I interpret Mr. Meredith's article in the Review his intention was to present both aspects of the problem, medical and legal, and, from all the facts, he has arrived at the conclusion that, for safety, the M'Naghten Rules should remain in force. He does not recommend that the M'Naghten Rules be modified, but, in his opinion, if any amendment providing for the defence of irresistible impulse should be drafted, it should be such as to demand "proof beyond all reasonable doubt" that the commission of the crime was irresistible and not merely unresisted. As in the Pennsylvania ruling (*Comm.* v. *Mosler* (1846), 4 Pa. St. 264), the irresistible impulse doctrine should be "recognized only in the clearest cases".

The reasons for my belief that Dr. Stevenson's recommendations are too radical and thus would most likely tend to prevent, rather than assist, administration of justice are, briefly, as follows.

"Irresistible impulse" is a generally recognized phenomenon. Doubts of its existence have long ago been completely dispelled by repeated experiences. Kleptomania is an example of the more frequent manifestations of it; senseless murder of children by their mothers is another. But that the M'Naghten Rules have been so outmoded by the advances in medicine that they no longer afford a proper basis for testing criminal responsibility is by no means as clear as many psychiatrists believe.

That inclusion of irresistible impulse as a defence would seriously impair administration of justice and thereby permit guilty persons to escape punishment is suggested from the manner in which this defence has been made use of until now. Psychiatrists agree that insanity affects will and emotions more often than intelligence. It is also a fact that the charge of murder is less common that that of manslaughter and still less common than other crimes punishable by long periods of imprisonment. Yet, compared with

the use of irresistible impulse as a defence in trials for murder, its use in trials for the lesser crimes has been rare, the guilty obviously having preferred a definite period of imprisonment to an indefinite period of incarceration in an asylum for the insane. On statistical grounds, therefore, it seems clear that irresistible impulse has been found by criminals to be a convenient defence in capital cases, the alternative having been the inelastic hemp. As Professor Sydney Smith has pointed out (*Principles and Practice of* Medical Jurisprudence, 9th ed., 1934, vol. 1, p. 817) "the doctrine of 'irresistible impulse' has been strained to such a degree as to create in the public mind a distrust of medical evidence on these occasions". This, to say the least, is disturbing to members of the medical profession, particularly to those who, because of their duties, find themselves from time to time on the witness stand.

On the other hand, for a number of reasons, the problem cannot be solved by the suggestion that medical consultation replace trial by jury, or, at least, that the function of the jury be restricted to determination as to whether the accused had committed the act, leaving it to a board of psychiatrists to deal with the psychopathic aspects. Firstly, as Mr. Meredith has pointed out, such practice would be in violation of our constitution; but, even assuming a change in the constitution to permit the practice, there is the following which psychiatrists, who are opposed to the M'Naghten Rules in their present state, as well as to their modification by addition of irresistible impulse to them, seem to overlook.

Psychiatrists point out that irresistible impulse is merely a symptom of mental disorder; that, as Dr. Stevenson put it, "the clinical entity, *the disease itself*, not the symptoms, should be the criterion for judging the responsibility of the accused. The presence of a psychosis (*i.e.* a clinically recognizable form of insanity) when the act was committed should be synonymous with legal irresponsibility. . . ". This is the reason Dr. Stevenson asked the question: "Is the average jury capable of understanding psychiatric technicalities and of coming to a proper decision on the sanity of the accused person?" What is thus overlooked is the fact that the jury is dealing with a legal and not a medical question, and it is a legal fact that insanity *per se* is not, in all circumstances, a complete answer to a criminal charge. As Mr. Meredith has pointed out, in certain circumstances, "insane persons, including certifiable lunatics, may be criminally responsible".

As I see it, two factors to be considered before any changes are made in the M'Naghten Rules are (a) the degree of certainty with which irresistible impulse can be diagnosed and (b) the present safeguards to prevent injustice in spite of the limitations set by the M'Naghten Rules in testing criminal responsibility.

The first question, therefore, is: Are psychiatrists, from the evidence of witnesses at a trial and from their examinations of the accused some time after the crime has been committed, able beyond all reasonable doubt to differentiate between "irresistible" and "unresisted"? My knowledge of psychiatry is very limited; but I have the impression that the answer in most cases is: No. With this, I believe, most authorities on forensic medicine agree.

Opposed to this limitation in diagnosis, there is the practice of granting reprieve in cases of murder when the existence of insanity has been definitely established, even in spite of a verdict of "Guilty" upheld by a Court of Appeal, by the very liberal interpretation of the rule that "no person can

be rightly. . . executed while insane" (*R.* v. *Leys* (1910), 16 O.W.R. 544). So far as I have been able to ascertain, because of this exercise of mercy, no insane murderer, commencing with Ronald True, has been executed in England, Canada or the United States during the last twenty-five years. In the 8th edition of his Forensic Medicine (J. A. Churchill, 1943) Sydney Smith states that "in practice the application of these rules [M'Naghten Rules] does not appear to have led to any grave miscarriage of justice". Though granted reprieve, the accused has been committed to an asylum; but, with this, all must agree. A person who might at some unpredictable time have an irresistible impulse is certainly not a safe person on the street or in the home.

Incidentally, though the Atkin's Committee had recommended the addition of irresistible impulse in tests of criminal responsibility, the recommendation was restricted to impulse which the prisoner was unable to resist because of "mental disease". Therefore, since the presence of mental disease is the basis of the exercise of mercy and thus of reprieve, it is difficult to imagine wherein the addition of irresistible impulse as a test of criminal responsibility would accomplish more than the M'Naghten Rules in their present state.

Combining all the facts therefore, as I see them, substituting of a board of medical experts for trial by jury, even partly only, is excluded not only on constitutional grounds, but by the fact that its findings would be restricted to insanity as seen medically, whereas the question is essentially a legal one. Addition of irresistible impulse to the M'Naghten Rules as a test of criminal responsibility would also serve no useful purpose, in view of the present practice of reprieve in cases of insanity which do not fit in with the requirements of the M'Naghten Rules. Not only would it serve no useful purpose, but, as the above-mentioned experiences with irresistible impulse as a defence clearly show, it would put into the hands of the murderer a very convenient means of escaping just punishment for his crime.

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A Collection of Early French Colonial Acts

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Since our library is not far from the Canadian border and happily it is easily crossed, it may be of interest to Canadian scholars to know that the University of Minnesota Law Library has lately acquired a collection of 1403 acts of the French Royal Administration concerning Canada and other French-American possessions dating from 1664 to 1790. The extent and importance of the collection may be gauged by comparison with a checklist prepared by Mr. Lawrence C. Wroth and Miss Gertrude L. Annan in 1930, which lists 2083 acts then found in the following libraries:

Archives des Colonies, in Archives Nationales
Series AD of the Archives Nationales
Bibliothèque St. Sulpice, Montreal

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British Museum
Bibliothèque du Ministère de la Marine
Boston Public Library
Harvard College Library
Henry E. Huntington Library
John Carter Brown Library
John Crerar Library
Library of Congress
Archives de la Marine, in Archives Nationales
Newberry Library of Chicago (Ayer Collection)
New York Historical Society
New York Public Library
Library of M. Charles de la Ronciere
William L. Clements Library
Yale University Library

While this list is primarily concerned with separately printed acts such as comprise our collection, it also included acts in various printed collections, even though they had not been found in separately printed form. Among the collections of such acts used in making the Wroth and Annan bibliography were the six-volume collection of Moreau de Saint-Mery entitled *Loix et Constitutions des Colonies Francoises de l'Amérique*, and the 29-volume *Jourdan Recueil Général des Anciennes Lois Françaises*.

In view of these facts it is interesting to note that only 609 of the items in the collection acquired by the University of Minnesota Law Library are listed in the Wroth and Annan bibliography. The remaining 794 acts are not listed and therefore would seem to be also outside the various collected publications of such acts examined by these bibliographers.

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AN ANSWER TO LAYMEN

Every accused is entitled to his day in court. This includes the right to be represented by competent counsel, and if he cannot afford a lawyer the court will assign one to defend him. It is the recognized duty of such an attorney to represent his client to the best of his ability. The judge appointing him to this perhaps unpleasant duty will not allow him to say "I think this man is guilty, so I refuse to defend him", since the law will not suffer him to deprive a prisoner of his defence. Similarly where one accused of crime has the means to retain a lawyer the latter should not allow his own distaste to prejudice the rights of his prospective client. As a member of the bar it is his duty to render his services to such as seek them. (Arthur Train, Yankee Lawyer: The Autobiography of Ephraim Tutt. New York: Charles Scribner's Sons)