Chapter 2
Existing Legislation on Mental Disorders and Criminal Cases

Abstract Having considered philosophical aspects of free will and determinism in the previous chapter, we turn here to reflections on the existing laws regarding mental disorders and criminal responsibility. We will see that legislation and case law in the English-speaking world have resulted in muddled and counter-intuitive verdicts. Rules for determining the sanity of the defendant at the time of the alleged crime are derived from the 19th century M'Naghten case and place emphasis on whether he or she was suffering from a "disease of the mind". It is application of this phrase which has most frequently run contrary to straightforward interpretation. Sensible recommendations for overhaul of the law on criminal liability and mental health have recently been drafted, but are unlikely to be enacted in the foreseeable future.

Keywords Automatism · Criminal liability · Diminished responsibility · Disease of the mind · Insanity · Mens rea · M'Naghten rules

Before reflecting upon the (limited but increasing) uses of biological evidence in criminal cases to date (Chap. 4), and the potential for broader applications of brain science in future cases (Chap. 5), it is important to establish the present legislation regarding mental disorders and criminal responsibility. The emphasis will primarily be on the situation in England and Wales, although the legacy of colonialism means that many countries share a common core of regulation. We will not, here, be considering the growing application of DNA and other forensic evidence relating to the crime itself (*actus reus*). Instead, the focus will be entirely upon the mental or fault-element (*mens rea*) for an offence that has been perpetrated.

Depending upon both the nature of the crime and the alleged cause of mental disorder, there are three defences that might currently be offered; insanity, diminished responsibility and automatism (see Table 2.1). It is important to note from the outset that these prevailing definitions are *legal* not *medical*. This, as will become apparent in subsequent sections, is only one of many problematic aspects in the current application of these rules.

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Table 2.1 Summary comparison of insanity, diminished responsibility and automatism (updated[a] from Jefferson 2009: p. 389)

	Insanity	Diminished responsibility	Automatism
Defence to	All offences	Murder	All offences
Cause	Must be internal	Must arise from a recognised medical condition	Must be external
Definition requires	Disease of the mind	Abnormality of mental functioning	Loss of consciousness
Burden of proof	On the accused	On the accused	On the prosecution
Standard of proof	Balance of probabilities	Balance of probabilities	Beyond reasonable doubt
Outcome if plea successful	Not guilty by reason of insanity (special verdict)	(Voluntary) manslaughter	Acquittal

[a]Criteria for a plea of diminished responsibility were originally described in the Homicide Act 1957 s2. This was amended by the Coroners and Justice Act 2009 s52

2.1 Insanity

Someone might be deemed insane at the time of their trial, and therefore "unfit to plead" (Law Commission 2010).[1] Alternatively, they might be considered sane at the time of the trial, but with one or more sides in the case arguing that they were insane at the time the crime was committed.[2] It is this latter scenario, in which the so called "special verdict" of "not guilty by reason of insanity" would be given, that is of greater interest in the current context.

In some senses, insanity is both the best place and the worst place to start a consideration of legal approaches to mental disorders and culpability. It is the best place since many of the rules governing the definition of insanity are essentially unaltered since the M'Naghten case of 1843.[3] It is the worst place because it is only infrequently used as a defence in the UK, fewer than five times per year throughout most of the 1970s and 1980s (Jefferson 2009). Following the Criminal Procedures (Insanity and Unfitness to Plead) Act 1991, this number has risen to 20–30 special verdicts per year; still a small drop in the ocean of about 90,000 people per annum tried in the Crown Court (Law Commission 2012). It is also a poor place to start

[1]The evolution of "unfitness to plead" is nicely summarised in a consultation paper produced by the Law Commission 2010.

[2]One high profile example of the sanity of the defendant was questioned occurred during the 2012 trial in Norway of Anders Breivik who was responsible for the murder of 77 people in the summer of 2011. Interestingly it was the prosecution on this occasion that had sought to show he was insane; Breivik himself had wished to be declared sane to support the argument that his actions were politically motivated and not the work of a deluded mind.

[3]M'Naghten's Case 8 ER 718, [1843] UKHL J16.

since the rules outlined by the presiding judge Lord Tindal CJ (see Sect. 2.1.1) have been interpreted in contradictory ways during the subsequent 170 years.

2.1.1 The M'Naghten Case

In 1843, Scottish woodturner Daniel M'Naghten was put on trial for the murder of Edward Drummond, but was found not guilty by reason of insanity. The judgment might have passed unnoticed except that the intended target was not Drummond, but rather his boss, Prime Minister Robert Peel. Not for the last time, the metaphorical proximity of a national political leader to the crime led to post hoc questioning of the ruling.

The matter was referred to the House of Lords and a debate on the concept of insanity. During the discussion, Lord Tindal observed that: "*the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and 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*." (quoted by Clarkson et al. 2010: p. 378).

There are several relevant points to note. Firstly, there is the presumption of sanity and, in consequence, responsibility. Secondly, insanity is stated as originating with "disease of the mind", which thirdly, causes "defect of reason" at the time of the crime. Fourthly, this defect of reason is manifest as a lack of discernment regarding either the nature and quality of the act, or that it was wrong. Because of this emphasis on knowing right from wrong, this has subsequently been referred to as a "cognitive test" of criminal responsibility (in contrast to a "volitional test", which we will mention later).

2.1.2 Interpretation of the M'Naghten Rules

Pivotal within the M'Naghten rules is the notion of "disease of the mind". It is this phrase, more than any other, which has proven problematic in the application of the rules both in the UK and overseas. It also has implications when we move on to consider the potential relevance of emerging biological understanding about the workings of the brain (Chap. 3).

Case law has shown that the "disease of the mind" need not be a mental illness, nor indeed a disease at all in a strict medical sense. Probably the most important demarcation to emerge has been the distinction between "internal causes" and "external causes". For a defence of insanity, the cause must be internal; if the cause

is external then it is considered a case of automatism (Sect. 2.3). This distinction has led to a series of judgments which, when seen side by side, look most peculiar; none more so than in regard to diabetic defendants.

A diabetic who was involved in a criminal incident as a consequence of going hypoglycaemic, that is they had excessively low blood sugar, was found to be exhibiting automatism (because the condition is caused by taking insulin, which was deemed to be an external cause),[4] whereas another diabetic who went hyperglycaemic (i.e. they have excessively high blood sugar, the natural outcome if they have not taken insulin) was found to be insane.[5] As Clarkson and colleagues note "*we are left with a law under which some diabetics will be able to secure a complete acquittal while others will be regarded as insane. Such a position is absurd*" (Clarkson et al. 2010: p. 383). At other times epilepsy,[6] atherosclerosis (hardening of the arteries)[7] and sleepwalking[8] have all been classified as diseases of the mind leading on to the special verdict.

Anomalies of these kinds have been offered, over many years, as evidence in calls to reform legislation in this area (see Sect. 2.4: Reform of the law). In 2012, the UK Law Commission conducted a consultation on Insanity and Automatism (Law Commission 2012), with their recommendations reported the following year (Law Commission 2013a). Their proposals are outlined in Sect. 2.4 (where it will also be explained why these are unlikely to be enacted in the near future). As it stands, therefore, the definition of insanity remains largely unaltered from M'Naghten.

There have, nonetheless, been some developments in the potential consequences of being found "not guilty by reason of insanity". As originally drafted, a successful defence of insanity would have led to detention in a secure hospital, possibly "with restrictions", i.e. until the Home Secretary deemed it appropriate for them to be released. This is clearly inappropriate for a diabetic who failed to remember to take their insulin, or an epileptic who causes harm whilst having a seizure. If the crime was murder, then hospitalisation for life was mandatory.

Since the Criminal Procedures (Insanity and Unfitness to Plead) Act 1991 came into force (in 1992) and was subsequently amended by the Domestic Violence, Crime and Victims Act 2004, judges have been granted more discretion regarding sentencing. A judge can now decide on the basis of medical evidence from two doctors, whether she considers the accused is unfit to plead. If, after this assessment, the judge *does* elect to go forward to trial, then a "trial of the facts" ensues, in which the prosecution must convince a jury beyond reasonable doubt that the defendant did carry out the crime for which they stand accused. If the jury find against the

[4]Quick [1973] QB 910.

[5]Hennessy [1989] 1 WLR 287.

[6]Sullivan [1984] AC 156.

[7]Kemp [1957] 1 QB 399.

[8]Burgess [1991] 2 QB 92, though there is more recent evidence that somnambulism is more likely now to be treated as a case of automatism.

defendant then the judge can choose from a range of sentences from detention in a psychiatric hospital, with restrictions, down to an absolute discharge.

2.2 Diminished Responsibility

Without being as susceptible to contradictory interpretations as the rules on insanity, there remain a number of complications regarding the defence of diminished responsibility. Most significantly, diminished responsibility is only applicable in cases of murder (or assisting in murder, but *not* attempted murder).[9]

Historically, this was appropriate; the defence stems from an era when the punishment for murder would have been execution.[10] It is really a *partial* defence; pleading diminished responsibility was de facto an admission to having killed someone, but offered an avenue for reducing the sentence to, for example, life imprisonment in circumstances where some explanation for the actions of the defendant might be offered. Since we are no longer in the habit of applying death sentences, at least not in the UK, some have argued that diminished responsibility should either be broadened to cover other crimes as well or abandoned as a defence (particularly if the punishment for murder is reduced from the current mandatory life sentence). In the chess game of legislation, claiming diminished responsibility is not without its risks. A successful appeal on these grounds leads inevitably to being found guilty of manslaughter and may still result in a long period of incarceration.

The original description of a person suffering from diminished responsibility in the Homicide Act 1957 required that he exhibited "*substantially impaired… mental responsibility*" caused by "*abnormality of mind*".[11] As a consequence of the Coroners and Justice Act 2009, this has been changed to "*abnormality of mental functioning*". The cause of this abnormality must be a recognised medical condition which substantially impaired the defendant's ability to understand the nature of their conduct, to form a rational judgement, and/or to exercise self-control.[12]

2.3 Automatism

Automatism has been defined as "*an involuntary movement of the body or limbs of a person [following] a complete destruction of voluntary control*".[13] A successful plea of automatism must demonstrate that at the time of the alleged offence, the

[9]The defence of diminished responsibility was introduced via the Homicide Act 1957.

[10]This, of course, remains a potential sentence in the majority of US states (see Chap. 4).

[11]Homicide Act 1957 s2.

[12]Coroners and Justice Act 2009 s52.

[13]Winn J, in Watmore v Jenkins [1962] 2 QB 572, 587.

accused was out of control as a consequence of an "external" influence, not something that they might reasonably been expected to predict. A finding in favour of the defendant leads to an outright acquittal.

A well-known case has bearing for the later debate regarding the current understanding of neuroscience. A man, Charlson, invited his son to look out of the window at a rat in the river below, whereupon he hit his son on the head with a mallet and threw him out of the window.[14] This may look superficially like a clear-cut case of insanity, but it was decided that he was suffering from automatism when it was revealed that the man had a brain tumour.

This verdict has been controversial on several grounds. Firstly, it clearly involves a physical abnormality within the man's brain, but was considered an "external" influence and not a "disease of the mind". Secondly, the man had committed a violent assault yet effectively walked free, despite the fact he may have remained a danger to others.

The case is therefore a reminder that there may be several conflicting reasons for a decision regarding the fate of a defendant. It has variously been suggested that sentencing can serve as a means towards retribution against the defendant, to act as a deterrent to others or to protect society (Eastman and Campbell 2006). This latter reason is the most prominent in cases of hospitalisation in a secure unit, alongside potential treatment and rehabilitation of the defendant.

2.4 Reform of the Law

As noted above, the Law Commission recently published their recommendations for revision of English Law concerning criminal liability (Law Commission 2013a). The specifics of their proposals will be outlined below (Sect. 2.4.1). Connoisseurs of the history of this field will not, however, be holding their breath whilst they await implementation of any changes. Erudite suggestions for reform have been made on many occasions but the majority have failed to make it onto the statute books.

Criticism of the M'Naghten rules go back almost as far as the rules themselves. Public expressions of dissatisfaction have been more pronounced since 1953, when the Royal Commission on Capital Punishment condemned the "*manifest absurdity of the M'Naghten test*" and recommended that the rules be abolished.[15] This did not happen, but the Commission did lead onto the Homicide Act 1957 and the introduction of the defence of diminished responsibility. A second proposed defence—that of "irresistible impulse"—was not included in the Act (Jefferson 2009).

[14]Charlson [1955] 1 All ER 859.

[15]Royal Commission on Capital Punishment, Cmnd 8932 (1953), p 104.

The Report of the Committee on Mentally Abnormal Offenders 1975, usually referred to as the Butler Committee,[16] proposed a new verdict of "not guilty on evidence of mental disorder". They also sought to define a mental disorder in a much more natural way than the M'Naghten rules suggested. Regarding issues that were clearly brain-related (lasting impairment of intellectual function, lasting alteration of mood, delusional beliefs, delusional misinterpretation of events) there would be a broadening of the definition, but the anomalies thrown up by case law (diabetes, epilepsy, sleepwalking) would not be included.

The Butler Committee recommendations have informed discussion, and been widely praised, in several subsequent reports, but the majority of changes have not been implemented. Some changes, such as diversification of the sentencing options after a special verdict *have* been enacted (Sect. 2.1), but at the core the M'Naghten rules still carry undue importance in English courts.

Over recent years, other jurisdictions in the English-speaking world have acted to amend their laws on mental disorders and criminal responsibility. These include Canada (1985),[17] Ireland (2006),[18] and Scotland (2010).[19] Here is not the place to discuss each of these in detail. Before returning to look at recent developments in England, and in light of the prominence that American cases will play in Chap. 4, it is however appropriate to pause briefly in order to elaborate on the evolution of the insanity defence in the United States of America, and particularly on the impact of the trail of John Hinckley upon the evolution of legislation in the USA.

In common with the UK, the laws governing criminal responsibility and the insanity defence have their roots in the M'Naghten case. At various times, as far back as 1887,[20] there have been concerns that the definition of insanity offered by the M'Naghten test was too narrow. The emphasis on the cognitive dimension, meant the potential criminalisation, it was alleged, of individuals who *knew* what they were doing was wrong but, for whatever reason, were unable to stop themselves acting on the impulse to do wrong. There was therefore calls for inclusion of a volitional test; to broaden the definition of insanity to cover those individuals for whom "disease of the mind" had impaired their ability to resist an action rather than knowledge that to do so would be wrong.

The volitional and the cognitive dimensions of insanity defence were formally brought together in the American Law Institute's Model Penal Code (MPC) of 1962. The MPC stated "*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*

[16]Report of the Committee on Mentally Abnormal Offenders (Butler) Cmnd 6244 (1975).

[17]Criminal Code, R.S.C., 1985, c. C-46, as amended.

[18]Criminal Law (Insanity) Act 2006.

[19]Criminal Justice and Licensing (Scotland) Act 2010.

[20]Parsons v State, 2So. 854 (Alabama 1887).

conform his conduct to the requirements of the law".[21] These standards were adopted by the DC Court of Appeal in 1972.[22]

Several aspects of the MPC prompted opposition. In particular, there were concerns that the prosecution were called upon to prove beyond reasonable doubt that the defendant was not insane. Coupled with the lack of a test to unambiguously distinguish an *inability* to avoid an action from an *unwillingness* to do so. These concerns came into sharp relief with the case of John Hinckley.[23]

In March 1981, Hinckley attempted to assassinate the American President Ronald Reagan. At his trial the following year, Hinckley was found not guilty by reason of insanity (the attack had been his attempt to impress the actress Jodie Foster with whom he was besotted).

The Hinckley verdict caused widespread outrage in the USA. In consequence, Congress, and half of the individual states tighten up their rules, with many becoming much closer to the M'Naghten rules than had previously been the case.

2.4.1 2013 Law Commission Discussion Paper

The discussion paper Criminal Liability: Insanity and Automatism (Law Commission 2013a) represents a significant attempt to chart an appropriate course for revision of the law in England regarding mental disorders and criminal responsibility. Unsurprisingly, the authors were scathing about the inadequacies of the current regulations. They propose abolition of the defence of insanity, and significant alteration to the defence of automatism in the light of other changes. In their place, the main defence would become "not criminally responsible by reason of recognised medical condition".

There are several points to note regarding the phraseology of the new defence. Firstly, the notion of "guilt" is replaced by "criminal responsibility" to fit an ambition to ensure that people are only punished on grounds for which they are appropriately accountable. Secondly, emphasis on "recognised medical conditions" tidies up the anomalies that have arisen from case law interpretation of "disease of the mind". Indeed, the new wording would broaden the definition of underlying causes to include physical as well as mental conditions, and would naturally encompass cases where loss of control arose from diabetes, epilepsy and sleep disorders. Thirdly, "recognised medical conditions" makes it immediately apparent that we are now working with appropriate medical definitions, not quasi-medical legal definitions, of disease. It also builds in provision for evolution of our understanding of the underlying causes of conditions.

[21]Model Penal Code (Proposed Official Draft 1962).

[22]United States v Brawner, 471 F.2d 969 (D.C. Cir. 1972).

[23]United States v Hinckley, 672 F.2d 115 (D.C. Cir. 1982).

If this change was brought in, there would be a corresponding re-definition of the defence of automatism. The latter would now be restricted to situations in which there was a "total loss of capacity to control one's actions which is not caused by a recognised medical condition" (Law Commission 2013b, para 118). Grey areas arising from the definition of internal factors v external factors would thus be removed.

The authors of the Law Commission Discussion Paper emphasise that existing medical conditions per se do not necessarily provide automatic exemption from prosecution. For example, if someone with a recognised sleeping disorder caused an accident whilst driving, having chosen to ignore tell-tale signs of their increasing drowsiness, then they exhibit "prior fault". Similarly, loss of capacity arising from voluntary intoxication would not be legitimate defence.

Overall, the Law Commission recommendations are logical, thorough and a vast improvement on the present legislations. As with earlier recommendations, however, it remains highly unlikely that these new proposals will be enacted any time soon.

History has shown that changes can come speedily when politicians recognise some vested interest. The original establishment of the M'Naghten rules in the UK was motivated, at least in part, by the fact that the Prime Minister was the intended target. In the USA, the fact that the President was the victim prompted the tightening of insanity rules following the acquittal of John Hinckley.

At other times the lack of political will to give a Bill the necessary time in parliament has seen potentially valuable amendments flounder. Authors of Criminal Law textbooks (e.g. Clarkson et al. 2010; Jefferson 2009) write wistfully of opportunities missed with the failure to see enacted the suggestions of various reports, particularly the Butler Committee 1975 and the Draft Criminal Code (Law Commission 1989).

In the case of the 2013 Law Commission Discussion Paper, the authors themselves recognise that there are actually more pressing changes within English Law that need to be made. In particular, they point to concerns regarding miscarriages of justice arising from a defendant's mental health at the time of their trial.

Despite, or perhaps because of, the obvious flaws in legislation on insanity and automatism when a crime is perpetrated, lawyers have developed effective work arounds that limit harms potentially arising due to these idiosyncrasies. Difficulties in the fair treatment of defendants who are, or should have been, identified as "unfit to plead" at trial are seen as a priority because they may affect a larger number of people and would 'filter down' to influence cases where the mental well-being of a defendant at both the time of the crime and the time of the trial are in doubt.

It is interesting to note, however, that should the changes recommended in the Law Commission discussion paper on Insanity and Automatism be enacted, the emphasis on a "recognised medical condition" might create room for greater consideration of the role played by deeper knowledge of biological factors in criminal behaviour. Before returning to that issue in Chaps. 4 and 5, let us first move on to consider some of the emerging data on genetic and neuroscientific aspects of behaviour.

References

Clarkson, C.M.V., H.M. Keating, and S.R. Cunningham. 2010. *Clarkson and Keating criminal law: Text and materials*, 7th ed. London, UK: Sweet and Maxwell.

Eastman, N., and C. Campbell. 2006. Neuroscience and legal determination of criminal responsibility. *Nature Reviews Neuroscience* 7: 311–318.

Jefferson, M. 2009. *Criminal law*, 9th ed. Harlow, UK: Pearson Education Ltd.

Law Commission. 1989. A criminal code for England and Wales, Report 177. Available online at http://www.bailii.org/ew/other/EWLC/1989/177_1.pdf. Last accessed 21st Aug 2014.

Law Commission. 2010. "Unfitness to plead", consultation Paper 197. Available online at http://lawcommission.justice.gov.uk/docs/cp197_Unfitness_to_Plead_consultation.pdf. Last accessed 21st Aug 2014.

Law Commission. 2012. Insanity and automatism: A scoping paper. Available online at http://lawcommission.justice.gov.uk/docs/insanity_scoping.pdf. Last accessed 21st Aug 2014.

Law Commission. 2013a. Criminal liability: Insanity and automatism—a discussion paper. Available online at http://lawcommission.justice.gov.uk/docs/insanity_discussion.pdf. Last accessed 21st Aug 2014.

Law Commission. 2013b. Criminal liability: Insanity and automatism—a discussion paper: summary for non-specialists. Available online at http://lawcommission.justice.gov.uk/docs/insanity_discussion_summary.pdf. Last accessed 21st Aug 2014.

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