Law Commission
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Insanity and Automatism
A Scoping Paper

18 July 2012

Law Commission

Scoping Paper (July 2012)

INSANITY AND AUTOMATISM

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Topic: This scoping paper poses questions about the criminal defences of insanity and automatism.

Geographical scope: England and Wales

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THE LAW COMMISSION

INSANITY AND AUTOMATISM

CONTENTS

PART 1
INTRODUCTION

1.1 This scoping paper seeks to discover how in the criminal law of England and Wales the defences of insanity and automatism are working, if at all.

1.2 On receipt of that evidence we will consider how best to take the project forward to ensure that the law in practice is fit for purpose in the 21st century and reflects the vastly changed approach to people with mental illness.

1.3 We stated our intention to examine the law relating to the defences of insanity and automatism in our Tenth Programme of Law Reform in 2008.[1] It was identified as an area of law which is highly suitable for a Law Commission project. The insanity defence is founded on nineteenth century legal concepts which have not kept pace with developments in medicine and psychiatry. Various bodies have reviewed the law and recommended reform[2] but the substance of the defence has remained unchanged, and so the faults persist. There is now a greater recognition of the difficulties the criminal justice system faces in dealing with people with mental illness and learning disabilities[3] and there is a growing pressure for reform. The defence of automatism is so closely related to that of insanity that it would make no sense to attempt to reform one without the other.

1.4 We are convinced, on the basis of our research to date, the vast wealth of academic literature and the previous reform proposals, that there are significant problems with the law when examined from a theoretical perspective.

1.5 There is, however, less evidence that the defences cause significant difficulties in practice. The empirical data suggests that there are only a very small number of successful insanity pleas each year (around 30). We have no data on how often the plea is considered by practitioners as a possibility or entered formally at trial. We have no data whatsoever on the use of the automatism defence. This paper therefore aims to discover whether the current law causes problems in application in practice and, if so, the extent of those problems. Throughout this paper the description of the present law and its problems is interspersed with questions designed to identify the extent of the practical problems with the law.

1 Tenth Programme of Law Reform (2008) Law Com No 311.

2 See Appendix D (Previous Reform Proposals).

3 *Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (April 2009), ("The Bradley report").

1.6 To supplement this scoping paper, we have published online a series of papers containing a more detailed analysis of the present law and its problems, particularly on the relevant legal tests and empirical studies, and the European Convention on Human Rights ("ECHR") implications of the present defences.[4] In this scoping paper we cross refer to five appendices also to be found online.[5]

1.7 This paper is about the law of insanity and automatism as defences in the criminal trial. The defence of insanity is contained in the so-called "M'Naghten Rules", together with some statutory material and decisions of the higher courts. Automatism is also a common law defence and it is available for all crimes. We will be discussing both in some detail in the following sections.

1.8 It is worth explaining from the outset some important related matters that this paper is not about. The project is not about how the criminal law should deal with people who are mentally ill at the time of trial. That is the issue of the fitness of a defendant to plead and participate in a criminal trial.[6] Nor is it about services that might be provided to offenders who are due to be sentenced; nor is it about whether or not some form of mental disorder should be a mitigating factor in sentencing offenders.

THE STRUCTURE OF THIS PAPER

1.9 We begin by describing the defences in outline and explaining why a scoping paper is necessary in this project. We then turn to consider how rarely the special verdict is returned and ask a series of questions designed to ascertain how commonly insanity is pleaded.

1.10 We proceed to examine the present law on insanity, concentrating first on the problems with the substance of the M'Naghten Rules before exploring a series of more general problems generated by the insanity defence. Throughout we ask whether these create difficulties in practice.

1.11 We turn in the third part of the paper to the problems posed by the law on automatism, and consider, in particular, whether the defence presents difficulties for public protection.

[4] Available at http://lawcommission.justice.gov.uk/areas/insanity.htm (last visited 15 Jun 2012).

[5] Appendix A (The Path of a Mentally Disordered Offender Through the Criminal Justice System); Appendix B (Not Guilty by Reason of Insanity Verdicts); Appendix C (The Law of Other Jurisdictions); Appendix D (Previous Reform Proposals); and Appendix E (Professor Mackay's research data on Not Guilty by Reason of Insanity verdicts).

[6] On this issue, see our consultation paper on unfitness to plead: Unfitness to Plead (2010) Law Commission Consultation Paper No 197, ("CP 197").

THE DEFENCES IN OUTLINE

(1) Insanity

1.12 A mental disorder[7] suffered by a defendant may affect what happens to him or her at various stages of the criminal justice process. For example, the case may be "diverted" out of the criminal justice system where the Crown Prosecution Service decides that it is not in the public interest to prosecute. If the case does proceed, then the accused might be found unfit to plead and to stand trial,[8] at which point the trial stops and the accused is no longer at risk of a conviction. The insanity defence becomes relevant if the prosecution is pursued and the accused is fit to plead and stand trial.

1.13 At trial, a defendant may plead not guilty on the ground of insanity. A defendant may only rely on the defence of insanity if he or she satisfies the test laid down in the case of *M'Naghten*[9] of 1843. That test is:

> 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.

In other words, at the time of the alleged crime, the accused did not know what he or she was doing (known as the cognitive limb) or did not know that it was wrong (known as the wrongfulness limb), due to a "defect of reason" arising from "disease of the mind".

1.14 The defendant bears the burden of proving on the balance of probabilities that he is insane within that test.

1.15 If the test is met, the defendant is entitled to what is known as the "special verdict", that is he or she is found "not guilty by reason of insanity". We will sometimes refer below to the verdict of "not guilty by reason of insanity" simply as "the special verdict" for the sake of convenience.

[7] We use the phrase "mental disorder" to encompass all mental illnesses, disorders and disabilities of the mind including learning disabilities and difficulties.

[8] A defendant might be unfit to plead and to stand trial if, eg, he or she is mentally ill and cannot follow the proceedings. If he or she is unfit, then the court may proceed to a "trial of the facts". For further detail see CP 197.

[9] *M'Naghten's Case* (1843) 10 Clark and Finnelly 200, (1843) 8 ER 718, [1843-60] All ER Rep 229.

1.16 As a person who has been found not guilty by reason of insanity has not been convicted of any crime, he or she cannot be sentenced. The term "disposal" is therefore used to encompass the powers that a court has to deal with such a person. Following a special verdict, the court has the power to make an absolute discharge, a supervision order,[10] or to order that the individual be detained in a hospital, possibly with a restriction order.

(2) Automatism

1.17 Automatism is a term that is probably not familiar to non-lawyers, but can be explained in relatively simple terms. If an accused was not in conscious control of his or her body at the time of the offence, and that lack of conscious control was not caused by his or her own prior fault, then the accused may plead automatism. If successful, the plea results in a straightforward acquittal and the court has no special powers of disposal. A well known definition of automatism takes it to involve "an involuntary movement of the body or limbs of a person [following] a complete destruction of voluntary control".[11] This defence does not appear in a statute but is, like insanity, part of the common law of England and Wales. "Examples of forms of involuntariness which might amount to automatism include convulsions, muscle spasms, acts following concussion [and] physically coerced movements."[12]

1.18 In practical terms, if the defence is raised at trial, the judge must decide whether a proper evidential foundation for automatism has been laid before leaving the issue to the jury.[13]

1.19 Once the defence has put enough evidence before the court to support a denial of voluntariness, the plea of automatism must be considered by the jury or magistrates, and the burden is on the prosecution to disprove it. In other words, it is then up to the prosecution to make the jury or magistrates sure that the defence is not true.[14]

[10] A supervision order is an order that requires the person of whom it is made ("the supervised person") to be under the supervision of a social worker or an officer of a local probation board ("the supervising officer") for a period specified in the order of not more than two years. Schedule 1A to the Criminal Procedure (Insanity) Act 1964 (inserted by virtue of s 24(2) and sch 2 of the Domestic Violence, Crime and Victims Act 2004).

[11] *Watmore v Jenkins* [1962] 2 QB 572, 587, by Winn J.

[12] A Ashworth, *Principles of Criminal Law* (6th ed 2009) p 88, ("Principles of Criminal Law").

[13] *Stripp* (1979) 69 Cr App Rep 318; *Bratty* [1963] AC 386, 413; and see *Moses v Winder* [1981] RTR 37.

[14] See *Bratty* [1963] AC 386; *Burns* (1973) 58 Cr App Rep 364; and *Roach* [2001] EWCA Crim 2698, [2001] All ER (D) 98.

(3) The relationship between automatism and insanity

1.20 One of the most problematic aspects of the law is the overlap between the law of insanity and automatism.

1.21 English case law has drawn a distinction between "insane automatism" (which it classifies as "insanity") and "sane automatism". It has done this by distinguishing between whether the cause of the accused's lack of control was due to an "internal factor" (ie some malfunctioning of the person's body) or an "external factor" (such as a blow to the head). Involuntary conduct caused by an "internal factor" is classed as insanity and that leads to the special verdict. Involuntary conduct caused by an "external factor" is classed as (sane) automatism, leading to a simple acquittal.

1.22 The distinction is an unsatisfactory one for many reasons as we discuss below (paragraphs 2.22 to 2.35).

THE NEED FOR EVIDENCE ABOUT THE USE OF INSANITY AND AUTOMATISM

1.23 There are no data whatsoever on the use of the insanity defence in the magistrates' courts. We understand it is infrequently used. In the Crown Court, there are no data on the number of automatism or insanity pleas made. There are in the region of 20 to 30 special verdicts of insanity each year in the Crown Court.[15] On that very limited information, it is very difficult to make a meaningful assessment of the way the defences operate in practice. Without such information it is difficult to make proposals for reform or to have confidence that any proposals made will improve the law in practice. It was for that reason that, although we have identified strong principled reasons for reform, we felt it necessary to publish this scoping paper in which we ask questions about the defences in practice.

[15] We are drawing on research by Professor Cheryl Thomas, presented at Appendix B in the supplementary paper, and on research covering 1975 to 1988, reported at R D Mackay, "Fact and Fiction about the Insanity Defence" [1990] *Criminal Law Review* 247, 1992 to 1996, reported at R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 1997 to 2001, reported at R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, and R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011*, see Appendix E.

(1) Pre-trial diversion

1.24 In recent years significant steps have been taken where appropriate to divert offenders with mental health problems or learning disabilities away from the criminal justice system into other services.[16] We recognise that one of the reasons for the lack of information about the use of the insanity and automatism pleas at trial may be because so many people who might rely on such pleas are diverted from the criminal justice system before charge.

1.25 **1. Can consultees provide information about:**

(a) the numbers of people with mental disorder who are arrested on suspicion of criminal charges?

(b) the numbers of people with mental disorder whose mental disorder led to them being diverted from the criminal justice system rather than charged and prosecuted?

(c) the number of those with mental disorder who are charged with criminal offences?

(d) how the current definitions of insanity and automatism defences influence these figures?

1.26 In some cases the suspect will not be diverted from the criminal justice system at the very earliest stages, and consideration will be given by the Crown Prosecution Service to charging. The Code for Crown Prosecutors will inform the decision about charging,[17] but we are interested to know in more detail about how likely pleas of insanity or automatism influence that decision.

1.27 **2. In practice, how does the possibility that the accused will plead insanity or automatism play a part in decisions about which cases should proceed to trial?**

[16] See Appendix A. See also The Bradley report. The practice became more widespread following the publication of the Reed review: Department of Health and Home Office, *Review of Health and Social Services for Mentally Disordered Offenders and Others Requiring Similar Services* (1992).

[17] As noted in Crown Prosecution Service, *Prosecution of Offenders with Mental Health Problems or Learning Disabilities* (Jun 2010) http://www.cps.gov.uk/publications/research/offenders_with_mental_health_problems.html (last visited 15 Jun 2012). This report presents the findings from the research into the role of the Crown Prosecution Service in cases involving offenders with mental health problems or learning disabilities.

(2) Magistrates' court

1.28 As noted, there are no data on use of the insanity defence in the magistrates' court. Our anecdotal evidence is that it is infrequently used and this is in part because there has been confusion about when the defence applies (see paragraph 2.76). As we describe below, the correct position is that the insanity defence is available in the magistrates' court, but if it succeeds in that court, the accused is simply acquitted. Before the case reaches a conclusion in the magistrates' court, if it appears that the accused has a mental disorder[18] then the magistrates have the power to make a hospital order under section 37 of the Mental Health Act 1983. This is an order for the person to be detained in a psychiatric hospital. They cannot, in those circumstances, make a supervision order.[19]

1.29 **3. In practice, is the defence of insanity commonly pleaded in the magistrates' courts?**

1.30 **4. Can consultees provide examples of the use of the defence of insanity in the magistrates' court?**

1.31 **5. Does the inability of the magistrates' court to return a special verdict with relevant disposal powers (supervision orders and hospital orders) create difficulties in practice?**

1.32 We have no data on the number of pleas of sane automatism raised in the magistrates' court, or of whether they are successful.

1.33 **6. How frequently is automatism pleaded in the magistrates' court? How often is it successful?**

1.34 If the offence is triable either way (that is capable of being tried in the Crown Court or the magistrates' court) and the defendant's mental condition is likely to be an issue in the case, then the case is likely to be dealt with in the Crown Court instead of the magistrates' court.

1.35 **7. Can consultees confirm that in practice the more difficult cases involving pleas of insanity or automatism in either way cases are dealt with in the Crown Court?**

[18] In this context, mental disorder means "any disorder or disability of the mind", except it does not include dependence on alcohol or drugs, nor people with a learning disability "unless that disability is associated with abnormally aggressive or seriously irresponsible conduct". See s 1 of the Mental Health Act 1983.

[19] Magistrates can also make a hospital order following a conviction. It is not clear whether they can make one after an acquittal.

(3) Crown Court

1.36 We have no data on the number of pleas of sane automatism raised in the Crown Court, or of whether they are successful.

1.37 **8. How frequently is automatism pleaded in the Crown Court? How often is it successful?**

1.38 We have no data on the number of pleas of insanity made in the Crown Court. We know that successful insanity pleas are rare (see paragraphs 1.41 to 1.44 below). If the defence was commonly being pleaded unsuccessfully we would expect to see evidence of that in appeals against conviction challenging the terms of the defence and in discussion of unsuccessful pleas in the practitioner journals. There is no such evidence.

1.39 **9. Can consultees provide examples of pleas of insanity that have been made unsuccessfully and provide some evidence of how frequently such pleas are made?**

1.40 Although there is a paucity of information generally on how the insanity and automatism defences operate, in one area the available data is good: the number of special verdicts of insanity. This is thanks most notably to the work of Professors R D Mackay and C Thomas. Mackay has engaged in valuable empirical study of special verdicts in the Crown Court. His studies, spanning the years 1975 to 2011,[20] disclose the numbers of verdicts of not guilty by reason of insanity recorded annually as well as the disposals used and other data relating to the offenders. Professor Thomas's work, to which we refer in what follows, can be viewed in detail in Appendix B.

[20] See R D Mackay, "Fact and Fiction about the Insanity Defence" [1990] *Criminal Law Review* 247; R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714; R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399; and R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011,* see Appendix E.

1.41 From 1975 to 1991, there was an annual average of fewer than four verdicts of not guilty by reason of insanity.[21] This increased in the five years preceding the introduction, in 1991, of the Criminal Procedure (Insanity and Unfitness to Plead) Act, to an annual average of nearly nine.[22] Prior to 1991 the equivalent of a hospital order with restrictions was the only available disposal on a special verdict. The 1991 Act made a significant change to the law by providing the judge with the power to impose other disposals on a verdict of not guilty by reason of insanity, namely supervision orders and absolute discharges.

1.42 The increase in the number of verdicts continued between 1997 and 2001. During that period there were 72 successful pleas of insanity, giving an annual average of 14.4.[23]

1.43 Between 2002 and 2011, there were 223 successful pleas of insanity. This period shows:

> A gradual but steady rise in the number of [not guilty by reason of insanity] verdicts. … In essence … the annual average number of [not guilty by reason of insanity] verdicts has now reached over twenty for the first time, with the total for 2011 having exceeded 30, also for the first time.[24]

The greatest number of insanity verdicts for any one year in that research period was 34 in 2011.[25] However, this does not reflect a trend of gradual increase between that period; rather, there were fluctuations throughout.[26]

1.44 The general trend of increasing numbers of special verdicts is consistent with the research carried out by Thomas and presented at Appendix B. That research covers a different period from the Mackay research. It covers 1 October 2006 to 31 January 2009, which is a shorter period. It records 89 verdicts (reflecting multiple charges) out of 40 cases of not guilty by reason of insanity in that period.

[21] Figures obtained from R D Mackay, "Fact and Fiction about the Insanity Defence" [1990] *Criminal Law Review* 247 and R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714.

[22] 8.8 for 1992 to 1996: "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 716. This period showed a gradual increase in number of verdicts of not guilty by reason of insanity from 6 verdicts in 1992 to 13 verdicts in 1996.

[23] See table 1 in R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 400.

[24] R D Mackay*, The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011*. See Appendix E at paras E.5 and E.6.

[25] R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011*. See Appendix E table 2a at para E.6.

[26] R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011*. See Appendix E table 2a at para E.6.

1.45 **10. Are consultees aware of any reasons why cases of successful insanity pleas might not have been recorded in the official data?**

Diagnosis of those found not guilty by reason of insanity

1.46 As regards the diagnosis of those who have received the special verdict, where it is known, the most frequently found diagnosis was schizophrenia.[27] Mood disorders were found in between 12% and 15% of cases. Diagnoses of epilepsy or post-ictal state (ie an altered state of consciousness experienced following a seizure) were also present across all research periods, accounting for between 6.8% and 12% of diagnoses following a special verdict.

1.47 **11. Can consultees confirm that, in their experience, these diagnoses are the ones that most commonly lead to pleas of insanity being made? If not, what other mental disorders are commonly relied on as the basis of an insanity plea?**

What might we conclude from the data on special verdicts?

1.48 As noted, in England and Wales there are only around 20 to 30 special verdicts each year in the Crown Court.[28] Given the nature and extent of mental disorder in the prison population and in the wider society, this appears to be a surprisingly low total. A sense of how low these figures are can be gained by means of a comparison with the estimated number of persons in the prison population thought to have a serious mental disorder.

[27] R D Mackay, "Fact and Fiction about the Insanity Defence" [1990] *Criminal Law Review* 247, 248; R D Mackay and G Kearns "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 717; and R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 401.

[28] We are drawing on research by Professor Cheryl Thomas, presented at Appendix B in the supplementary paper, and on research covering 1975 to 1988, reported in R D Mackay, "Fact and Fiction about the Insanity Defence" [1990] *Criminal Law Review* 247, 1992 to 1996, reported in R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 1997 to 2001, reported in R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, and R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011*, see Appendix E.

1.49 Of the approximately 90,000 people tried in the Crown Court each year,[29] a proportion of those will be seriously mentally disordered. If the proportion used reflects the incidence of serious mental illness in the prison population – say 10%, being the estimated proportion of the prison population which is seriously mentally ill[30] – then that would mean that 9,000 of those tried are seriously mentally ill. Presumably some of those 9,000:

- were not mentally ill at the time of the offence but become seriously mentally ill following prosecution, particularly if imprisoned.
- were so mentally ill at the time of trial as to be found unfit to plead and to be tried.
- pleaded guilty because of their mental disorder.[31]
- have serious mental illness at the time they commit offences but do not plead insanity.
- have serious mental illness at the time they commit offences but would not qualify for the insanity defence because of the M'Naghten formulation. This might be particularly true of some individuals with learning difficulties.[32]

[29] *Judicial and Court Statistics 2010*, http://www.justice.gov.uk/downloads/statistics/courts-and-sentencing/csq-q4-2011-crown-court-tables.csv (last visited 15 Jun 2012).

[30] This was the figure used by Michael Spurr, then Operational Head of HM Prison Service in BBC Radio 4 (2008) "Life on the Inside at HMP Liverpool" Evan Davis interviews Alan Brown and Michael Spurr, cited by K Edgar and D Rickford, *Too Little Too Late* (Prison Reform Trust, 2009) p 6.

[31] See eg *Murray* [2008] EWCA Crim 1792. Studies suggest that mentally disordered defendants are more likely to make self-incriminating statements, even where they may not be true: A D Redlich and others, "Self-reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness" (2010) 34 *Law and Human Behavior* 79 and G Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (1992) but we note that the studies are not conclusive due to insufficient research in this area.

[32] The proportion of people in the general population with learning disabilities can be assumed to be around 2%: study commissioned by the Department of Health cited by E Emerson and C Hatton, *People with Learning Disabilities in England* (Centre for Disability Research Report, 2008) p i. A study of three prisons found that just under 7% of the prison population were assessed as learning disabled and over one quarter as borderline learning disabled: K Edgar and D Rickford, *Too Little Too Late* (Prison Reform Trust, 2009) p 29. See also "amongst young people in custody the incidence of mental disorder is far higher (31%) than in the general population (10%). In addition, it has been reported that one in five young offenders have an IQ of less than 70." Sentencing Advisory Panel, *CP on Principles of Sentencing for Youths* (2008) p 77. An IQ of less than 70 is part of the diagnosis of learning disability. The Department of Health's figures show that over a quarter of young people in custody have a learning disability, and over a third have a diagnosed mental disorder (HMG, *Healthy Children, Safer Communities* (Dec 2009) p 14).

1.50 Even taking account of these factors, the disparity between the figure and the number found legally insane is striking.

1.51 We want to achieve a better understanding of how frequently the insanity defence is used. Throughout the rest of this Part, we will be exploring some of the defects with the law. Many of those problems could provide explanations as to why the number of special verdicts is low. They could also explain what we assume to be the very low number of pleas of insanity.

1.52 **12. Can consultees offer explanations as to why the number of special verdicts is so low?**

PART 2
INSANITY DEFENCE

PROBLEMS WITH THE M'NAGHTEN RULES

2.1 In the introduction we provided a short outline of the M'Naghten Rules that define the insanity defence. We turn now to a more detailed examination of the present law and its problems. The precise wording of the central part of the rules is as follows, with numbers added to assist in following the subsequent discussion:

> 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, (1) at the time of the committing of the act, (2) the party accused was labouring under such a defect of reason, (3) from disease of the mind as (4) not to know the nature and quality of the act he was doing, or (5) if he did know it, that he did not know he was doing what was wrong.[1]

(1) The requirement to prove D's "act"

2.2 In the Crown Court, for the verdict of not guilty by reason of insanity to be given, the prosecution must prove that the accused "did the act or made the omission".[2] This means that the prosecution have to prove "the ingredients which constitute the actus reus",[3] and are not required to prove any mental element (mens rea).[4] The actus reus can be described as the conduct element of an offence. For example, in the case of criminal damage, the actus reus is causing damage to property belonging to another.

2.3 It is not always easy to draw distinctions between the actus reus and the mens rea in the offence. While in many cases it may be evident what constitutes the actus reus, in cases where the actus reus realistically requires some awareness of the action (such as where a person possesses or keeps an item, or permits an

1 *M'Naghten's Case* (1843) 10 Clark and Finnelly 200, 210, (1843) 8 ER 718, [1843-60] All ER Rep 229.

2 Trial of Lunatics Act 1883, s 2(1).

3 *A-G's Reference (No 3 of 1998)* [2000] QB 401, 411.

4 *Antoine* [2001] 1 AC 340, 345, [2000] 2 WLR 703.

activity[5]) it is not so obvious. The case law acknowledges this difficulty but leaves it unresolved.[6]

2.4 This problem is not confined to only a few offences. In recent years, a large number of offences have been created which blend a mental element into the actus reus and where this question would arise on a plea of not guilty by reason of insanity.[7] Problems arise, in particular, with the charges involving secondary liability and inchoate offences such as conspiracy where the "act" has little significance without reference to the circumstances and the mental state with which it is performed.

2.5 A recent example is provided in an unfitness to plead case where the same issue arises: what is "the act" that the defendant must be proved to have done. In *B,*[8] B, who had Asperger's syndrome, was charged with two counts of voyeurism under section 67 of the Sexual Offences Act 2003. He had been seen lying on his back looking under the dividers between cubicles in changing rooms watching young boys who were naked in the process of getting changed. At trial, the judge found B to be unfit to be tried. A trial of the facts took place before a jury to determine if B did the "act".[9] The issue arose as to what the "act" was in an offence of voyeurism. The judge ruled that it was the physical act of "observing" the boys in their state of undress in a private place, but that it was not also necessary to establish that B acted "for the purpose of sexual gratification". That element would be required to prove the full offence, but not the issue of whether B did the "act". On appeal, the Court of Appeal allowed B's appeal and recorded a verdict of acquittal. It was held that in determining whether a defendant, who was unfit to stand trial, had performed the "act" of voyeurism the jury had to be satisfied that he had deliberately observed another person doing a private act and had done so for the purpose of his own sexual gratification.

2.6 The case demonstrates how difficult it can be to identify the "act" in isolation from the circumstances and mental element with which it is performed. The practical problem is obvious: it is not always clear what the prosecution has to prove for there to be a verdict of not guilty by reason of insanity, and leaving the accused's mental state out of account may be unfair. The risk of inconsistent application of the law and protracted argument at trial is obvious.

5 See the commentary by Sir John Smith at [2002] *Criminal Law Review* 588, 589.

6 In *R (Young) v Central Criminal Court* the trial judge noted, "this distinction cannot be rigidly adhered to in every case because of the diverse nature of criminal offences and criminal activity": [2002] EWHC 548 (Admin), [2002] 2 Cr App R 12 at [12], by Rose LJ.

7 See CP 197, paras 6.28 and 6.29 for examples of such offences.

8 [2012] EWCA Crim 770, (2012) 176 JP 312.

9 Criminal Procedure (Insanity) Act 1964, s 4A.

2.7 **13. Are consultees aware of difficulties in practice arising from the requirement to prove an "act", and the problems in identifying the "act" element in an offence?**

(2) The interpretation of "defect of reason"

2.8 The term "defect of reason" has been interpreted to mean that the accused's powers of reasoning have to be impaired at the time of the commission of the offence. A mere failure to use powers of reasoning is not enough.[10] Momentary failure of concentration, even where caused by mental illness, is not insanity within the M'Naghten Rules. A defendant in such a case would rely on the evidence of mental illness to negative mens rea where that formed part of the offence. For example, in *Clarke* where the allegation was of shoplifting, and the accused suffered depression that made her absent minded, had she contested the charge of theft, she would have argued that, because of her depression, she did not form the intention necessary for that offence.[11]

2.9 The definition of "defect of reason" also excludes from the scope of the insanity defence abnormalities of mind such as an inability to control one's emotions or resist impulses.[12] These do not reflect impaired powers of reasoning. This narrow construction of the defence has met with telling criticism from leading academics. As Ashworth notes, "some forms of mental disorder impair practical reasoning and the power of control over actions". He argues that it follows that the power of controlling one's actions "should clearly be recognized as part of a reformed mental disorder defence".[13]

2.10 **14. Does the definition of "defect of reason" give rise to problems in practice by excluding from the scope of the defence those who ought not to be held criminally responsible? If so, please explain why.**

2.11 **15. Can consultees provide examples of cases in which the inability to plead insanity in cases where the accused lacked self control presented problems in practice?**

(3) Disease of the mind

2.12 The M'Naghten test requires the accused to be suffering from a "disease of the mind". The kind of disorder that is relevant is not necessarily a disease in the ordinary sense of that word, and the word "mind" is not interpreted to mean "brain".

[10] *Clarke* [1972] 1 All ER 219, 221, by Ackner J.

[11] *Clarke* [1972] 1 All ER 219.

[12] *Kopsch* (1927) 19 Cr App Rep 50; *A-G of South Australia v Brown* [1960] AC 432.

[13] Principles of Criminal Law p 145.

2.13 Significantly therefore, "disease of the mind" is not limited to mental illness: "it means a disease which affects the proper functioning of the mind".[14] "Mind" here means, in the words of Lord Diplock, "the mental faculties of reason, memory and understanding".[15] What matters is the effect of the impairment, as he explained:

> If the effect of a disease is to impair these faculties so severely as to have either of the consequences referred to in the latter part of the rules, it matters not whether the aetiology of the impairment is organic, as in epilepsy, or functional, or whether the impairment itself is permanent or is transient and intermittent, provided that it subsisted at the time of commission of the act.[16]

2.14 Judges give the phrase a more modern interpretation in practice: in the guidance given to judges on how to direct the jury "disease of the mind" is described as "an impairment of mental functioning caused by a medical condition".[17]

2.15 Some conditions are clearly going to be regarded as diseases of the mind, for example forms of psychosis or schizophrenia.[18] However, one consequence of the courts' broad interpretation of "disease of the mind" is that people with conditions that would not be described generally as mental disorders have been held to come under the M'Naghten understanding of insanity. These include, for example, epileptics, diabetics and sleepwalkers.

[14] *Hennessy* [1989] 1 WLR 287, 292, by Lord Lane CJ.

[15] *Sullivan* [1984] AC 156, 172. The defendant claimed that he had committed the alleged assault while suffering a seizure caused by psychomotor epilepsy. He argued that his defence of "non-insane automatism" ought to have been left to the jury. The Court of Appeal rejected the appeal, as did the House of Lords.

[16] *Sullivan* [1984] AC 156, 172.

[17] Judicial Studies Board, *Crown Court Bench Book* (March 2010) p 327.

[18] The fact that the accused had a condition that is a disease of the mind at the time of the offence does not mean that, by reason of that condition alone, he or she will qualify for the insanity defence. The defence also requires a lack of awareness of the act and wrongness (see paragraphs 2.37 and following and 2.49 and following).

Physical or mental

2.16 It does not matter whether the disease which "affects the proper functioning of the mind"[19] is physical or mental in origin. For example, in *Kemp*[20] the Court held that arteriosclerosis (hardening of the arteries) which resulted in a congestion of blood on the brain of the accused was a disease of the mind. The defendant relied on that disease to explain an apparently motiveless and irrational violent attack on his wife. Experts agreed that his condition had resulted in a temporary lapse of consciousness during which he perpetrated the attack. He was not conscious that he had picked up a hammer, nor that he had struck his wife with it. Afterwards, he had no recollection of the event. The court rejected the defence argument that because it arose from a physical illness the defect of reason was not a result of a "disease of the mind".[21] According to Mr Justice Devlin:

> The words "from disease of the mind" are not to be construed as if they were put in for the purpose of distinguishing between diseases which have a mental origin and diseases which have a physical origin.[22]

2.17 Under this interpretation, the defence of insanity is capable of incorporating mental conditions which have a physical cause and which may result in a defect of reason for a very short period. This occurred in *Sullivan*[23] where the defendant claimed that he had committed the alleged assault while suffering a seizure caused by psychomotor epilepsy.

2.18 The definition appears to be based primarily on concerns for ease of application by the courts to ensure maximum public safety. As Lord Diplock acknowledged in *Sullivan* "the defence of insanity … [is] to protect society against recurrence of the dangerous conduct".[24] The interpretation is based on policy rather than legal principle or indeed any definitions used by medical professionals.

2.19 **16. Does the wide interpretation of "disease of mind" create problems in practice?**

2.20 **17. Do medical practitioners have difficulty in preparing reports for trials of insanity because of the legal definition of disease of the mind?**

[19] *Hennessy* [1989] 1 WLR 287, 292, by Lord Lane CJ.

[20] [1957] 1 QB 399.

[21] [1957] 1 QB 399, 407. The defence argued it was such only when the brain cells were caused to degenerate.

[22] [1957] 1 QB 399, 408. Approved by Lord Diplock in *Sullivan* [1984] AC 156, 172.

[23] *Sullivan* [1984] AC 156.

[24] [1984] AC 156, 172. The legislation he was referring to was that providing for a special verdict where insanity is proved, namely the Trial of Lunatics Act 1883.

2.21 **18. Would an insanity defence based on distinctions between physical and mental "diseases" or "conditions" create arbitrary distinctions in application?**

Internal and the external

2.22 As noted, English criminal law distinguishes between a defence of "insane automatism" (insanity) and a defence of "sane automatism" (automatism) according to whether the cause is internal or external. If the cause is internal, then the appropriate defence is insanity; if it is external, then it is a case of automatism.

2.23 The distinction between internal and external causes of loss of control has given rise to a number of odd decisions. It leads to the label of insanity being applied to those suffering epilepsy as we have already noted.[25] And the label has also been applied by the Court of Appeal to sleepwalking in *Burgess* since the Court thought that such somnambulism must be ascribed to something internal to the defendant.[26] The pool of individuals who would potentially fall within the scope of the defence is therefore surprisingly wide.

2.24 The internal/external test has also been demonstrated to create arbitrary distinctions leading to unfairness and decisions which are hard to reconcile. The application of the law to diabetics demonstrates this most starkly. Diabetics may suffer excessively high blood sugar (hyperglycaemia) or excessively low blood sugar (hypoglycaemia), and both states may be caused by "external factors" (alcohol or insulin) or "internal factors" (lack of food or insufficient insulin). In *Hennessy*,[27] the defendant had a hyperglycaemic episode caused by his failure to take a prescribed dose of insulin. His loss of control was created by a factor internal to him so his reliance on that at trial was classified as a plea of insanity. In contrast, in *Quick*[28] the loss of control arose when a diabetic suffered a hypoglycaemic attack following his failure to eat after taking insulin. His loss of control was an external cause and therefore an automatism plea. The Court of Appeal held that there will be no "disease of the mind" under the M'Naghten Rules, where a malfunction was "caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences".

[25] *Sullivan* [1984] AC 156.

[26] *Burgess* [1991] 2 QB 92.

[27] *Hennessy* [1989] 1 WLR 287.

[28] [1973] QB 910.

2.25 The upshot is that a diabetic who, without fault, fails to take insulin and then commits an allegedly criminal act would be treated as insane. In contrast, a diabetic who took insulin in accordance with a medical prescription would be acquitted if he or she was an automaton at the time they committed an allegedly criminal act whether that was because he or she had an unexpected reaction to the insulin or because having taken the insulin he or she failed to eat through no fault of their own. As Ashworth has written:

> There can be no sense in classifying hypoglycaemic states as automatism and hyperglycaemic states as insanity, when both states are so closely associated with such a common condition as diabetes.[29]

Many other commentators have suggested that the contrasting positions of the defendants in *Quick* and *Hennessy* is highly illogical. As Fenwick comments:

> For a violent act committed while the mind is disordered owing to an excess of insulin is a sane automatism if the insulin is injected, but an insane automatism if the insulin comes from an insulinoma of the pancreas. The distinction between sane and insane automatism is a meaningless one, and if the legal profession could bring itself to do so, it is probably best abandoned altogether.[30]

2.26 **19. Are consultees aware of cases in which the insanity and automatism defences have been pleaded (a) successfully or (b) unsuccessfully in relation to physical or mental states arising from diabetes or its treatment? If so, please give details.**

2.27 Beyond its application to diabetes, others have criticised the basis of the distinction between internal and external conditions. One basis for criticism is that with some conditions, both internal and external factors may operate simultaneously, as in sleepwalking or hypnosis: some people are more susceptible to sleep disorders, but then there may be an external trigger (an interruption to sleep) which also plays a part in loss of capacity. Reznek writes:

[29] Principles of Criminal Law p 94. Around 2.5 million people in England and Wales have diabetes: http://www.diabetes.org.uk/Professionals/Publications-reports-and-resources/Reports-statistics-and-case-studies/Reports/Diabetes-prevalence-2010/ (last visited 15 Jun 2012).

[30] P Fenwick, "Automatism" in R Bluglass and P Bowden (eds), *Principles and Practice of Forensic Psychiatry* (1990) p 275, quoted in L Reznek, *Evil or Ill? Justifying the Insanity Defence* (1997) p 94.

> There is a more fundamental reason why the distinction [between internal and external] will not work. From matches to people, everything they do is a function of both external and internal factors. A match will ignite if it is dry (internal factor) and heated (external factor). When people become ill, it is because of some external factor (such as a virus) and an internal factor (such as immune vulnerability). This applies even to those disorders we consider to be induced wholly by external factors (infections) as well as those we consider to be induced wholly by internal factors (metabolic disorders).[31]

2.28 **20. Are consultees aware of cases in which the strict internal/external distinction has been impossible or difficult to apply because of there being multiple causes of the accused's defect of reason?**

2.29 Cases of sleepwalking provide another illustration of problems created by the present approach. According to English case law, a defendant who pleads not guilty on the basis that he or she was asleep at the time of the alleged offence should be classified as putting forward the insanity defence.[32] There are signs, in very recent years, that in applying *Burgess*, the lower courts have taken a generous approach, treating sleepwalking as a plea of sane automatism. Recent examples include *Bilton*,[33] where the defendant, who had a history of sleepwalking, was acquitted of rape after the jury accepted his claim that he had been sleepwalking at the time. As Mackay and Mitchell point out, this case does not seem to have resulted from an episode of "confusional arousal disorder"[34] but rather appears to be a clear somnambulistic episode, traditionally within the ambit of *Burgess* and the insane automatism defence.[35]

[31] L Reznek, *Evil or Ill? Justifying the Insanity Defence* (1997) p 94.

[32] *Burgess* [1991] 2 All ER 769, [1991] 2 QB 92.

[33] *Bilton* (20 Dec 2005) *The Guardian* (unreported). See also *Pooley* (12 Jan 2007) *The Daily Mail* (unreported) and R D Mackay and M Reuber, "Epilepsy and the Defence of Insanity: Time for Change?" [2007] *Criminal Law Review* 782, 791. In response to recent cases, the Crown Prosecution Service issued guidance on sleepwalking, particularly within the context of rape and other sexual offences: *Defences – Sleepwalking as a Defence in Sexual Offences Cases*. http://www.cps.gov.uk/legal/d_to_g/defences_-_sleepwalking_as_a_defence_in_sexual_offence_cases/ (last visited 15 Jun 2012).

[34] A confusional arousal describes an episode in which a person arouses from sleep and remains in a confused state. Confusional arousals occur in both sleepwalkers and normal individuals. They occur in response to a sudden disturbance during the deep phase of sleep. The subject awakens into a confusional state, and this may result in an unprovoked violent episode. The confusional state may last for a few minutes before the subject returns to consciousness. See I Ebrahim and P Fenwick, "Sleep-related Automatism and the Law" (2008) 48(2) *Medicine, Science and the Law* 124.

[35] R D Mackay and B J Mitchell, "Sleepwalking, Automatism and Insanity" [2006] *Criminal Law Review* 901.

2.30 **21. Are consultees aware of cases in which a defendant's claim to have committed the offence while sleepwalking has been treated as a plea of automatism rather than insanity? Please give details.**

2.31 There is even less clarity in the correct legal approach where internal and external factors co-exist, for instance, where an individual sleepwalks and suffers from alcohol-induced confusional arousal.[36] This confusion can be seen in the contrasting cases of *Lowe*[37] and *Pooley*.[38] In *Lowe*, the defendant fatally attacked his elderly father one night whilst voluntarily intoxicated. The defence argued that the attack occurred while sleepwalking or, alternatively, when he was in a confusional arousal state. The defendant's plea of insane automatism was accepted and he was hospitalised for eight months.[39] However, in *Pooley*,[40] the defendant was acquitted of rape on the ground of sane automatism after he successfully proved that he was suffering an episode of parasomnia, a sleep disorder which can include sleepwalking, despite his own voluntary intoxication.

2.32 **22. Can consultees provide examples of problems in practice where defendants have based pleas of insanity or automatism on their having been intoxicated and asleep at the time of the offence? Please give details.**

2.33 A yet further difficulty with this boundary between internal (insanity) and external (automatism) has arisen in so-called "psychological blow" cases where the accused enters into a dissociative state following a traumatic event. We discuss this below in the context of automatism (see paragraph 3.10).

[36] I Ebrahim and P Fenwick, "Sleep-related Automatism and the Law" (2008) 48(2) *Medicine, Science and the Law* 124.

[37] *Lowe* (19 Mar 2005) *The Times* (unreported).

[38] *Pooley* (12 Jan 2007) *The Daily Mail* (unreported) and R D Mackay and M Reuber, "Epilepsy and the Defence of Insanity: Time for Change?" [2007] *Criminal Law Review* 782, 791.

[39] R D Mackay and B J Mitchell, "Sleepwalking, Automatism and Insanity" [2006] *Criminal Law Review* 901.

[40] *Pooley* (12 Jan 2007) *The Daily Mail* (unreported) and R D Mackay and M Reuber, "Epilepsy and the Defence of Insanity: Time for Change?" [2007] *Criminal Law Review* 782, 791.

Summary

2.34 In sum, the law has not adopted a distinction between mental disorders and physical disorders, so that the latter are outside of the scope of the notion of "disease of the mind" in M'Naghten. Instead, it has adopted a distinction between internal and external factors which as we have seen leads to highly illogical results. The "line drawn between sane and insane automatism can never make medical sense".[41] It "makes illogical, hair-splitting distinctions inevitable, allowing some an outright acquittal while condemning others to plead guilty or take the risk of a special verdict".[42]

2.35 **23. Does the wide interpretation of "disease of mind" and the distinction between internal and external factors create problems in practice? Please provide details.**

2.36 Despite the breadth of the definition of disease of the mind and the difficulties it creates, the other elements of the M'Naghten Rules are construed so narrowly that the defence will be denied to many with serious mental disorders. We turn now to consider the core elements of the defence.

(4) The "nature and quality of the act"

2.37 A defendant who knows the nature and quality of his or her act does not qualify for the special verdict of insanity (unless he or she falls within the "wrongness limb" that we examine below). This nature and quality limb may be thought too narrow in two ways. First, because it is based on an unduly narrow concept of what must be known. Secondly, an exclusive focus on cognitive questions excludes other sorts of problems in the functioning of minds and brains, volitional questions or emotional ones. We examine each in turn.

2.38 The defence applies if the defendant does not "know" of the "nature and quality of the act". The courts have held that the insanity defence is unavailable if the defendant has knowledge of the *physical* aspects of the act alleged even if he does not have knowledge of the moral aspects of his act: *Codère.*[43] It is clear that in this (physical) sense it will be very rare indeed for a person with a relevant medical or physical condition not to know the nature and quality of his or her actions. As Wallace puts it:

[41] P Fenwick, "Automatism, Medicine and the Law" (1990) *Psychological Medicine, Monograph Supplement* 17, 23.

[42] W Wilson, I Ebrahim, P Fenwick and R Marks, "Violence, Sleepwalking and the Criminal Law: Part 2: The Legal Aspects" [2005] *Criminal Law Review* 614, 617.

[43] *Codère* (1917) 12 Cr App Rep 21, 27 (emphasis added). See also R D Mackay, "Mental Disability at the Time of the Offence" in L Gostin and others, *Principles of Mental Health Law and Policy* (2010) p 723.

> Cases in which a mentally ill person literally has no idea about the nature or quality of her acts seem quite rare. More commonly when someone is in the grip of such conditions as depression or paranoia does something wrong (attacking a relative, say), she will know perfectly well that she is attacking the person; indeed such actions are sometimes elaborately premeditated.[44]

2.39 Consider, as an example, the US case of Andrea Yates.[45] Yates, a woman with a history of mental illness, drowned all five of her children in a bath. Believing that Satan had been conversing with her, she concluded she needed to kill her children while they were still innocent to save them from an eternity of torment in hell. Yates knew she was killing her children and a sign of her premeditation was her awareness of the special problem her eldest child Noah (aged 7) would pose to her course of action, given his developing physical strength. According to the "nature and quality" limb as interpreted by *Codère*, Yates did know the nature and quality of her acts. Someone in her position would not be able to rely on this limb of the insanity defence in English law.

2.40 **24. Does the narrow interpretation of the nature and quality limb of the M'Naghten Rules present difficulties in practice? Please provide details.**

2.41 Turning to the second way in which the interpretation of this limb of the defence be thought too narrow, it has often been considered a problem that the M'Naghten Rules exclude volitional and emotional issues. The Royal Commission on Capital Punishment, for example, in their 1949 to 1953 report, objected to M'Naghten on the basis that it was:

> Based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily, affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions.[46]

[44] R Wallace, *Responsibility and the Moral Sentiments* (1994) p 168.

[45] The two trials of Andrea Yates are treated at length as a case study by the psychiatrist C P Ewing in ch 10 of his *Insanity, Madness, Murder and the Law* (2008). See also D W Denno, "Who is Andrea Yates? A Short Story about Insanity" (2003) 10 *Duke Journal of Gender Law and Policy* 1.

[46] Report of the Royal Commission on Capital Punishment (1953) Cmd 8932, para 227. For a detailed examination of previous reform proposals, see Appendix D.

2.42 Excluding the volitional or emotional from the legal classification of the ways mental disorders affect sufferers is overly simplistic but that is not untypical of the way the mental illness is (mis)understood. For example, it is often popularly assumed that a schizophrenic is someone with two or more personalities, "Jekyll" at one time, "Hyde" at another. However, the term schizophrenia was intended to capture the idea of a split between the components of one mind, knowledge, emotion and will, not the idea of one mind splitting into two or many minds.[47] Once one sees this in relation to schizophrenia[48] one can start to doubt the appropriateness of the purely cognitive tests in the M'Naghten Rules. If schizophrenia is a "dis-integration" of the cognitive, emotional and volitional, it would be surprising to discover that only cognitive failings, to the exclusion of anything volitional or emotional, should properly be the basis for a legally recognised denial of responsibility.

2.43 The most significant difficulty with excluding volitional defects is distinguishing someone who has the capacity of self-control but does not exercise it on the relevant occasion, on the one hand, from someone who lacks the capacity for self-control altogether.

2.44 **25. Does the inability to plead insanity in cases where D lacked self control rather than lacked cognitive ability, present problems in practice?**

2.45 Similarly, questions arise as to whether there are disorders that are primarily emotional in nature, rather than cognitive, which are currently excluded by the M'Naghten definition that ought to be relevant to a determination of criminal responsibility. It does indeed seem odd: "emotions play such a large part in moral decisions that it would be unreasonable to dismiss disorders of the emotions as irrelevant to responsibility".[49]

[47] C Frith and E Johnstone, *Schizophrenia* (2003) p 155.

[48] This is particularly significant for our purposes since it is the single most common diagnosis among persons successfully using the insanity defence. According to Mackay, between 1975 and 1988, the most frequently found diagnosis in those found not guilty by reason of insanity verdicts was schizophrenia: R D Mackay, "Fact and Fiction about the Insanity Defence" [1990] *Criminal Law Review* 247, 248. That group represented just over half of all such verdicts: R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714. This pattern is mirrored in subsequent research where the diagnosis was available. See table 2 in R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 717 and table 2 in R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 400. Unfortunately, this information is not available for the latest research period between 2002 and 2008.

[49] C Elliott, *The Rules of Insanity* (1996) p 115.

2.46 Some conditions such as chronic anhedonia (the inability to experience pleasure) and serious depressive pessimism regarding the possibility that life can improve can be debilitating.[50] Presumably they are most likely to lead if anything to self-harming behaviour rather than anything criminal, but may create risks of neglect in cases where sufferers are carers of others. It would be interesting to hear if cases of an emotional or volitional sense are causing difficulties in practice.

2.47 **26. Does the inability to plead insanity in cases where D's mental disorder appears to be emotional in nature, rather than cognitive, present problems in practice?**

2.48 **27. What principal practical problems arise from the interpretation of the nature and quality limb of the defence?**

(5) "He did not know he was doing what was wrong"

2.49 We turn now to the second of the core elements of the MNaghten Rules, the "wrongfulness limb". The issue of interpretation that has troubled the courts here is whether "wrong" means "contrary to law", or "morally wrong".

2.50 English law has adopted an unusually, and arguably unjustifiably, narrow interpretation of the "wrongfulness" limb. In *Windle*,[51] Lord Goddard interpreted it as meaning that if the accused knew that what he or she is doing was against the law, then the insanity defence is not available. The effect has been:

> To close off the possibility of expanding the interpretation of the word "wrong" … to include situations where the accused's mental disorder prevented him from realizing that his actions could not be rationally justified.[52]

[50] See R Schopp, "Cognition, Rationality and Responsibility" in P Robinson and others, *Criminal Law Conversations* (2009) p 467.

[51] [1952] 2 QB 826.

[52] F McAuley, *Insanity, Psychiatry and Criminal Responsibility* (1993) p 31.

2.51 This interpretation of the law was confirmed in *Johnson*.[53] Other jurisdictions – notably Canada and Australia – have interpreted the law differently on this point. In *Johnson*, the accused was suffering from delusions and auditory hallucinations. He was later diagnosed as having paranoid schizophrenia. He stabbed a neighbour in an unprovoked attack. One of the psychiatrists who examined him said that the accused did not see that what he had done was wrong in the moral sense, because of the delusions affecting his mind. The accused was convicted and the judge made a hospital order.

2.52 The Andrea Yates case discussed above is also useful to illustrate the problem with the "wrongness" limb. If the English law test of the wrongness limb as interpreted in the light of *Windle* and *Johnson* were to be applied to the facts in the Yates case, she would not qualify for the defence of insanity. It is not morally wrong to save one's children from a catastrophic harm (what Yates believed she was doing in drowning her children). But it is morally wrong to drown one's children, with the intention of killing them (which is as much as Yates succeeded in doing). Yates could have argued that she did not know what she was doing was morally wrong. However, she did know, it appears, that what she was doing was against the law.

2.53 In the words of Dr Phillip Resnick, a forensic psychiatrist expert witness in the case:

> Mrs Yates had a choice to make; to allow her children to end up burning in hell for eternity or take their lives on earth … . She would give up her life on earth … and her afterlife for the purpose of eliminating Satan and protecting her children from the fate of eternal damnation.

2.54 Yates, it appeared, understood perfectly well that drowning her children was against the law. Resnick under cross-examination was asked "But she (Yates) knew it was legally wrong?". He replied "That's correct … I agree." In short, though Yates delusionally believed she was saving her children, she realised that the means she needed to use were illegal. The same would of course be true if her deluded belief she needed to protect her children led her to criminality short or well short of murder.

2.55 **28. Does the fact that the defence of insanity does not apply to those who do understand the legal wrongness of their acts create any problems in practice?**

[53] *Johnson* [2007] EWCA Crim 1978, [2008] *Criminal Law Review* 132, discussed by R D Mackay in "Righting the Wrong? Some Observations on the Second Limb of the M'Naghten Rules" [2009] *Criminal Law Review* 80.

MEDICAL PRACTITIONERS: HOW THE M'NAGHTEN RULES ARE APPLIED

2.56 Having examined the legal definitions of the "wrongness limb" and the "nature and quality" limb of the M'Naghten Rules, it is convenient to consider how those formulations are applied by medical experts.

2.57 The application of the common law M'Naghten test is supplemented by the requirement of section 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. This means that, for the insanity defence to succeed, there must be oral or written evidence from two or more registered medical practitioners,[54] and at least one of those practitioners must be "duly approved". "Duly approved" means that at least one of them must be approved for the purposes of section 12 of the Mental Health Act 1983 by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder.[55]

2.58 Data on the application of the M'Naghten Rules is limited to pre-2002 research.[56] That research consistently found that the "wrongness" limb of the insanity defence was referred to in psychiatric reports more often than the "nature and quality" limb.

2.59 **29. Is it consultees' experience that in those cases in which insanity is pleaded, the wrongness limb of the defence is relied on more commonly?**

2.60 An analysis of psychiatric reports shows that the "wrongness" limb remains the limb most commonly relied upon.[57] However, it is also clear from the studies that in practice a wider interpretation of the "wrongness" limb was used than the legal definition as described above.[58] Mackay and Kearns report that "it is safe to say that the vast majority of these reports made no reference to knowledge of legal wrongness".[59] The research suggests that psychiatrists seem to be interpreting the M'Naghten test as being satisfied if the accused did not know it was morally wrong to act in the way alleged even if he or she did know it was legally wrong to do so.

[54] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s 1(1).

[55] Section 6(1) of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991.

[56] Access to court files and psychiatric reports was unavailable for the study of 2002 to 2008: R D Mackay, *The Insanity Defence – Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011.* See Appendix E at para E.4.

[57] For further details see R D Mackay, *Mental Condition Defences in the Criminal Law* (1995) pp 102 to 103, ("Mackay (1995)") and R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 722.

[58] *Windle* [1952] 2 QB 826, cited in R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 722.

[59] R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 722.

2.61 Indeed, Mackay comments that his empirical research supports the contention that an "unofficial" version of the insanity defence is used in practice, in which the defence is limited to those who would be "popularly considered crazy":[60]

> Both judges and juries do appear to be approaching the interpretation of the M'Naghten Rules in a liberal manner: the "wrongness limb" is not only more frequently used than the "nature and quality limb" but also seems to be applied in cases where the accused believed that what they were doing was morally right. Why is this? Could it be that judges and juries simply consider such mentally ill persons to be "crazy"?[61]

2.62 The suggestion is that psychiatrists are adopting a pragmatic approach in widening the scope of the M'Naghten Rules, and that their approach was being accepted on occasion by the judges.[62]

2.63 **30. Do consultees have experience of a variation between the legal interpretation of the wrongness test and what is applied in practice?**

2.64 Our brief review of the M'Naghten test has demonstrated the many difficulties posed by the legal interpretation of all of its elements. We are keen to hear from medical practitioners about other difficulties, if any, that the test poses in practice.

2.65 **31. Do medical practitioners find that the M'Naghten test causes difficulties when preparing a report for a criminal case? What are these?**

2.66 **32. Do medical practitioners have experience of cases in which in their opinion the accused's mental condition did not meet the M'Naghten test, but his or her mental state at the time of the offence was such that he or she ought not to have been held criminally responsible? How are such cases dealt with?**

2.67 The fact that the insanity plea can only succeed where there is evidence from at least two registered medical experts[63] means that psychiatric evidence takes on an enhanced role in such trials. Ultimately, however, the verdict is one to be made by the tribunal of fact (the jury or magistrates).

[60] Mackay (1995) p 90 quoting M Moore, "Causation and the Excuses" (1985) 73 *California Law Review*, 1091, 1139.

[61] Mackay (1995) p 90.

[62] R D Mackay, B L Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 407. See also the cases referred to by R D Mackay in "Righting the Wrong? Some Observations on the Second Limb of the M'Naghten Rules" [2009] *Criminal Law Review* 80, 83 to 84.

[63] Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s 1(1).

2.68 **33. Does the enhanced role of the psychiatric evidence create difficulties in practice?**

The role of experts

2.69 The present law requires that a verdict of "not guilty by reason of insanity" must be delivered by the jury; it is not possible for the prosecution to accept such a plea. Nevertheless, some of the research suggests that juries often have little deliberative role, if any.[64] In a significant proportion of insanity cases from 1997 to 2001, the jury was formally directed by the judge to return a verdict of not guilty by reason of insanity or they were presented with a situation where all parties agreed beforehand that the case was one of not guilty by reason of insanity.[65] That practice was also found in later research.[66] A jury trial may add to the difficulty for the defendant pleading insanity who, although fit to stand trial, clearly has had serious health problems and there may be good reasons to avoid a trial where all parties agree that the accused satisfies the M'Naghten test.

2.70 **34. Are consultees aware of a practice of the prosecution accepting insanity pleas and/or judges directing juries to return the special verdict?**

2.71 **35. Do experts feel that the present test inhibits psychiatrists from expressing their views with clarity and confidence about matters of psychiatry?**

2.72 **36. Does the requirement to have a jury verdict create difficulties in practice?**

OTHER PROBLEMS WITH THE INSANITY DEFENCE

(1) Incoherence

2.73 We have already discussed the theoretical problems of the relationship between insanity and automatism and the arbitrariness created by the distinction drawn between internal and external causes. There are other theoretical problems with potentially significant practical consequences. One problem is that it is unclear whether the insanity defence is essentially a denial of mens rea,[67] or a denial of responsibility for the crime. Our view is that the true rationale of the defence is to deny criminal responsibility, not merely to deny mens rea. This follows from the

[64] R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 404.

[65] R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 402.

[66] R D Mackay and G Kearns, "More Fact(s) about the Insanity Defence" [1999] *Criminal Law Review* 714, 719.

[67] See, eg, G Williams, *Textbook of Criminal Law* (2nd ed 1983) pp 642 to 645. The argument was raised in *Felstead* [1914] AC 534 but the House of Lords' answer was ambiguous.

view that it would be fundamentally unfair and unjust to hold someone criminally responsible for their conduct if, through no fault of their own, they lacked the capacity to obey the law.

2.74 The practical consequence of this is that if a defence of insanity is a denial of criminal responsibility, then the availability of the defence should not depend on whether there is a mens rea element to the offence.[68] This is not merely a theoretical concern. Consider the following example. The accused is charged with the offence of causing a water discharge activity, in other words, polluting surface water,[69] which is a strict liability offence, punishable in the magistrates' courts by up to £50,000 and/or 12 months' imprisonment, and in the Crown Court by an unlimited fine/up to 5 years' imprisonment. The accused, who suffers from delusions, including that he has been entrusted by a supernatural power with the task of saving the world, pollutes the water because he believes he has been commanded to do so. If the insanity defence is only relevant to mens rea, then he would be held responsible and convicted unless diverted from trial (see above paragraph 1.24).

2.75 **37. If prosecuted would the insanity defence be likely to be pleaded?**

(2) The defence is not available in the magistrates' courts if there is no mental element to the offence

2.76 The defence of insanity can be pleaded in the magistrates' courts, but, according to one interpretation of the law in *Director of Public Prosecutions v Harper*,[70] it is only available if there is a mental element in the offence. For example, a charge under section 47 of the Offences Against the Person Act 1861 involves a physical element (that the accused caused actual bodily harm to the alleged victim) but also that the accused had a particular state of mind when that happened. For other offences there is no mental element, such as the offence mentioned above of causing a water discharge activity (polluting surface water).[71]

2.77 The judgment of *Director of Public Prosecutions v Harper* has been cogently criticised by leading academics,[72] and we think it is mistaken. It leads to the anomaly that if a person is charged with an offence where there is no mental

[68] C Wells, "Whither Insanity?" [1983] *Criminal Law Review* 787, 794.

[69] Environmental Permitting (England and Wales) Regulations 2010, SI 2010 No 675, regs 38(1)(a) and 12(1)(b). We thank HHJ Atherton for this example.

[70] [1997] 1 WLR 1406.

[71] Environmental Permitting (England and Wales) Regulations 2010, SI 2010 No 675, regs 38(1)(a) and 12(1)(b).

[72] Eg, T Ward, "Magistrates, Insanity and the Common Law" [1997] *Criminal Law Review* 796.

element, then he or she can plead the insanity defence if the case is tried in the Crown Court but not if it is tried in the magistrates' courts.

2.78 **38. In practice, is the defence of insanity applied to offences of strict liability in the magistrates' court? Please give examples.**

(3) The law is out of step with medical understanding

2.79 Terms like "insanity" and "disease of the mind" are not medical terms, but outdated legal terms. There have been calls for the M'Naghten Rules to be brought into line with modern medical knowledge for at least 60 years.[73] Many other jurisdictions have met these concerns by recently reforming their insanity test by legislation (Scotland in 2010,[74] Ireland in 2006) or at common law (Canada, Australia).[75]

2.80 The practical consequences of a legal test that is so out of step with modern medicine is that it may impede proper diagnoses and expert evidence of "insanity". Experts ought not to have to translate a psychiatric condition into an outmoded legal concept.

2.81 **39. Does the present test based on M'Naghten create difficulties for experts in diagnosing those who may be deserving of a defence on the basis of a lack of criminal responsibility? Please provide examples.**

2.82 **40. Does the M'Naghten test impede experts in writing reports?**

2.83 **41. Does the M'Naghten test create difficulties for experts in testifying in trials where insanity is pleaded? Please provide examples.**

[73] Report of the Royal Commission on Capital Punishment (1953) Cmd 8932, para 248. This report is discussed at paras D.6 to D.14 in Appendix D.

[74] Criminal Justice and Licensing (Scotland) Act 2010, s 168, which inserts a new s 51A into the Criminal Procedure (Scotland) Act 1995. Due to come into force on 25 Jun 2012.

[75] Though a recent review of the law in New Zealand concluded that, although there are faults with the law, no change was the best option. See New Zealand Law Commission, *Mental Impairment Decision-Making and the Insanity Defence*, R120 (2010).

(4) The label "insanity" is stigmatising and inaccurate

2.84 The very name of the defence might be off-putting or even offensive to many people. Sometimes a label contained in a criminal offence is itself so offensive that it deserves to be changed for that reason alone, as was surely the case with the (now defunct) offence of "procur[ing] a woman who is a defective to have unlawful sexual intercourse".[76] Whether "insanity" is quite in the same category is debateable. However, it is doubtful whether the term "insanity" has any purpose beyond identifying the class of persons the law recognises as not responsible based on a mental or physical condition — it plainly has no currency among psychiatrists and mental health professionals. If it is highly stigmatising, it may be thought desirable to change the labelling of the exemption.

2.85 However, there is an argument that with mental illness, whatever label is chosen, stigma will persist.[77] Some argue that the stigma that attaches to "the insane", though real and regrettable, attaches more to mental disorder in general rather than to the specific word. [78]

2.86 **42. How significant should changing the label of the verdict be in the reform of the law of insanity?**

Deterrent effect of stigma

2.87 Some respondents to our consultation paper on partial defences to murder expressed the view that, "the stigma which attaches to being labelled 'insane' makes defendants reluctant to plead insanity".[79] There is evidence of this as an important practical consequence of the inappropriate label of the insanity defence: people who ought to be able to rely on the defence do not try to rely on it but prefer to plead guilty, in order to avoid the stigma.[80]

[76] Sexual Offences Act 1956, s 9(1).

[77] Professor Thomas is currently undertaking work for us on the jury and on public attitudes to mental disorder and to crime and dangerousness.

[78] N Sartorius, "Stigma of Mental Illness: A Global View" in L B Cottler (ed), *Mental Health in Public Health: the Next 100 Years* (2011) pp 213 to 222. See also N Sartorius and H Schulze, *Reducing the Stigma of Mental Illness: A Report from a Global Programme of the World Psychiatric Association* (2005).

[79] Judge Advocate Camp; Assistant Judge Advocate General; Silber J; and R D Mackay, respondents to Partial Defences to Murder (2003) Law Commission Consultation Paper 173.

[80] As occurred in *Hennessy* [1989] 1 WLR 287; *DPP v Desmond* [2006] IESC 25; and *Sullivan* [1984] AC 156. In *Sullivan* the accused had kicked a man while suffering an epileptic fit. His plea of non-insane automatism was removed from the jury, following which the defendant preferred to plead guilty. See the NHS Information Centre's 2011 report *Attitudes to Mental Illness* http://www.ic.nhs.uk/webfiles/publications/mental%20health/mental%20health%20act/Mental_illness_report.pdf (last visited 15 Jun 2012).

2.88 Strictly speaking the insanity verdict is only meant to imply that the defendant was insane at the time of the alleged offence and not "insane" generally. Indeed Lord Diplock points out in *Sullivan* that the special verdict "is a technical one which includes a purely temporary and intermittent suspension of the mental faculties".[81] "Strictly speaking" and "technically" this appears to be correct but it is far from clear that this is how it will be perceived by someone leaving court with a verdict labelling them in terms of "insanity". One or two criminal convictions might be put down to youthful hotheadedness or something of the kind, while the label of insanity may be thought of as something that cannot in the same way be shaken off.

2.89 Plainly, the prospect of a criminal conviction must be something unpleasant to an ordinary person. But there is reason to qualify that simple statement to some extent. Official estimates show that in 2006, 28.2% of adult males aged between 18 and 52 had a criminal conviction for a non trivial offence. This includes all indictable and triable either way offences plus the more serious summary offences such as assault and criminal damage. The figures include some driving offences (driving whilst disqualified, driving with excess alcohol, dangerous driving and driving without insurance) but not less serious offences such as careless driving. The equivalent proportion of women aged 18 to 52 is 6.5%.[82] This might add to the sense that while a criminal conviction may always be unwelcome, it has now become common enough for its stigma to be limited. The same may emphatically not be true about insanity. Especially if the potential punishment is not on the more severe end, a defendant may prefer to take his or her chances with the ordinary verdicts and even be found guilty, simply to avoid any stain of the stigma of "insanity".

[81] *Sullivan* [1984] AC 156, 173.

[82] See Ministry of Justice Statistical Bulletin, *Conviction Histories of Offenders Between the Ages of 10 and 52* (Jul 2010) at http://www.justice.gov.uk/downloads/statistics/mojstats/criminal-histories-bulletin-pdf (last visited 15 Jun 2012).

2.90 As noted, the broad interpretation of the term "disease of the mind" results in epileptics, diabetics and others with mental conditions that would not be described generally as mental disorders being classified as insane. Those people might understandably be reluctant to plead the defence. Ashworth has referred to "the gross unfairness of labelling [such people] as insane in order to ensure that the court has the power to take measures of social defence against them".[83]

2.91 **43. Can practitioners provide examples from their experience where the label of "insanity" has deterred an accused from pleading the defence when his or her condition would have satisfied the M'Naghten Rules?**

(5) Burden of proof if the insanity defence is raised

2.92 The general approach to the burden of proof in English law is that stated by Lord Sankey: "Throughout the web of the English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove [beyond a reasonable doubt] the prisoner's guilt". That was followed by his recognition of an exception at common law for the defence of insanity.[84] If the defendant pleads insanity, then the burden of proof lies on the defence. This means that the accused has to prove all the elements of the defence on the balance of probabilities.

2.93 This gives rise to the problem that a defendant might fail to discharge the burden of proof. The jury may believe that on the balance of probabilities the defendant was not insane. That will result in him or her being convicted of the offence. However, that conviction will be secured without the jury necessarily being satisfied beyond all reasonable doubt that he or she was guilty. It will be sufficient that they were satisfied to the civil standard that he was not insane (and that could be as low as being 51% sure of his not being insane). Plainly that means that someone may be convicted of an offence when there is more than a reasonable doubt that he is insane and thus ought properly to be exempt from criminal responsibility.

2.94 **44. Can consultees provide examples of cases in which the requirement for the defendant to bear the burden of proof causes unfairness?**

[83] Principles of Criminal Law, p 143. About 600,000 people in the United Kingdom have been diagnosed as having epilepsy: Epilepsy Action, http://www.epilepsy.org.uk/info/basics/living-with-epilepsy (last visited 15 Jun 2012). Around 2.5 million people in England and Wales have diabetes: *Diabetes Prevalence 2010*, http://www.diabetes.org.uk/Professionals/Publications-reports-and-resources/Reports-statistics-and-case-studies/Reports/Diabetes-prevalence-2010/ (last visited 15 Jun 2012).

[84] *Woolmington v DPP* [1935] UKHL 1, [1935] AC 462, 481.

2.95 There is also a risk that English law is in breach of article 6(2) of the ECHR. This article reads, "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law".

2.96 **45. Do practitioners have examples of challenges based on the compatibility of the law of insanity or automatism with the ECHR?**

2.97 In the USA in the aftermath of the attempt on the life of President Reagan by John Hinckley, Jr., many States made the decision to shift the burden of proving insanity onto the defendant. A study on the effect of that shift found that the placing of the burden of proving legal insanity on the defence significantly reduces the defendant's chance of succeeding.[85]

2.98 **46. Does the fact of the burden of proof falling on the accused inhibit the use of the defence in cases in which it ought to be relied on?**

2.99 **47. Does the burden of proof on the defendant present other problems in practice?**

2.100 The issue of insanity may in some circumstances also be raised by the prosecution. If the prosecution is seeking to prove insanity – for example, where the defendant denies the mental element of the offence charged (the mens rea) on evidence of mental disorder – then the burden of proving insanity lies on the prosecution to the criminal standard of proof, in other words, so the jury are sure that the accused is insane. We are unaware of any research identifying how often this happens.[86]

2.101 **48. Are consultees aware of cases in which the defence was raised by the prosecution? Please give details.**

2.102 If neither the prosecution nor the defence raise the issue of insanity, the judge may do so, if there is a sufficient basis,[87] in other words, if there is medical evidence relevant to all the factors in the M'Naghten Rules.[88]

2.103 **49. Are consultees aware of this happening in practice? Please give details.**

[85] H J Steadman and others, *Before and After Hinckley: Evaluating Insanity Defense Reform* (1993) cited in S Morse, "Mental Disorder and Criminal Law" (2011) 101 *Journal of Criminal Law and Criminology* 885, 923 to 924.

[86] Although it may be rare in practice for the prosecution to seek to prove insanity. See *Bratty* [1963] AC 386, 411 to 413.

[87] See *Bratty* [1963] AC 386, 411 to 412, by Lord Denning.

[88] *Dickie* [1984] 1 WLR 1031, by Watkins LJ.

(6) The special verdict in the Crown Court

2.104 If the defence of "insanity" succeeds in the Crown Court, a person is not simply acquitted, but receives a special verdict of "not guilty by reason of insanity". This verdict does not lead to the usual criminal penalties, but "disposals" as noted above. The available disposals are:

(1) A hospital order (with or without a restriction order attached),

(2) A supervision order, or

(3) An absolute discharge.

The principal effect of a restriction order is that the patient cannot be given leave of absence or transferred to another hospital without the approval of the Secretary of State, and may not be discharged from hospital except by the Secretary of State or a tribunal.

2.105 No hospital order (or supervision order with a medical requirement or mental health treatment requirement) may be made without oral or written evidence from two or more registered medical practitioners at least one of whom is approved for the purposes of section 12 of the Mental Health Act 1983 by the Secretary of State as having special experience in the diagnosis or treatment of mental disorder. In other words, a person may not be detained in a hospital without evidence from a psychiatrist. This is important in ensuring compliance with the ECHR requirement for medical evidence to support a decision to detain a person on the basis of their mental condition.

2.106 **50. Does the limited range of disposals available for a person found not guilty by reason of insanity create problems in practice? Please give details.**

2.107 Hospital orders may also be imposed on people who have been convicted of an offence. There is, however, an important difference from the position with an insanity verdict. If a defendant has been convicted, and the judge thinks that a hospital order is appropriate, the hospital does not have to agree to accept the offender. If, on the other hand, the accused has been found not guilty by reason of insanity then the judge may make a hospital order and the hospital cannot refuse to take the patient.[89]

2.108 **51. Does the requirement for two practitioners, one of whom must be duly approved, give rise to problems in practice? Please provide details.**

[89] Explanatory Notes to the 2004 Act, para 93. See s 37(4) of the 1983 Act where an order is made pursuant to s 5 of the 1964 Act, as substituted by s 5A of the 1964 Act.

2.109 An offender who has been convicted and is suffering from mental disorder might be transferred from prison to hospital,[90] but this will not necessarily happen and it will not always happen in a timely way.[91]

2.110 **52. Are consultees aware of difficulties or delays in transfers occurring between prison and hospital? Please provide details.**

Effect of disposal powers in deterring pleas of insanity

2.111 We have already considered the possible deterrent effect of the label of "insanity". One further reason a suspect may decide against advancing a plea of insanity is that he or she may consider that the sentences that might be imposed if convicted are a better option (or rather a less bad one) than the disposals available on a special verdict.

2.112 Historically, this explanation for the low use of the special pleas is certainly highly plausible. Under the Criminal Procedure (Insanity) Act 1964, effectively the only consequence of a successful not guilty by reason of insanity plea was indefinite mandatory confinement to hospital. However, the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 removed the requirement that all those found insane would necessarily be indefinitely detained.[92]

2.113 The absolute discharge and the supervision order have, it is clear, created new options considerably more favourable to a defendant considering his or her plea than what was available prior to the 1991 Act.[93] As we saw earlier (paragraphs 1.41 to 1.44) use of the special verdict has been growing since 1991 and the existence of these orders may be at least part of the explanation.

[90] As can be seen from Appendix A, it is not the case that a person has to be found "insane" in law before he or she can or will receive any treatment. An accused person might be the subject of a hospital order at various stages of the criminal process. He or she does not have to be found not guilty by reason of insanity in order to be sent to a psychiatric institution in the course of criminal proceedings.

[91] On transfers to hospital, see para A.62 and following in Appendix A.

[92] See the NHS Information Centre's 2011 report, *Attitudes to Mental Illness*: http://www.ic.nhs.uk/webfiles/publications/mental%20health/mental%20health%20act/Mental_illness_report.pdf (last visited 15 Jun 2012).

[93] R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 407 to 410.

2.114 However, even after 1991 a defendant might regard the disposals on special verdict as unattractive. This argument carries more weight when it is appreciated that the most common disposal post-1991 remains the hospital order.[94] The potentially unattractive nature of the hospital order with a restriction order has itself been reduced to some extent by the Domestic Violence, Crime and Victims Act 2004. The Act imposes a requirement that there be medical evidence which justifies detention in hospital on the basis of a mental disorder that qualifies as such under the Mental Health Act 1983 and which in turn requires specialist mental health treatment. This is true even where the charge is one of murder.[95] Despite that, and the fact that the 1991 Act makes supervision orders and absolute discharges available, it remains the case that someone pleading insanity is still vulnerable to compulsory hospitalisation if they receive the special verdict.

2.115 Even the prospect of a supervision order might not be very attractive to a defendant. A supervision order might leave a person found not guilty by reason of insanity tied to a supervising officer for up to two whole years. It is therefore possible that a defendant may prefer instead to plead guilty to a criminal offence, believing he or she will only receive a short term of imprisonment, community punishment or even an absolute discharge, or fine.

2.116 We acknowledge that considerable steps have been made towards a more proportionate and appropriate set of disposals consequent on successful use of the special verdict after the 1991 Act. Nevertheless we are concerned that defendants may be deterred from pleading insanity for fear of the resulting disposal. We acknowledge, of course, that those disposals felt to be unattractive by a defendant may be appropriate or necessary in his or her case. That is not an issue we are here considering.

2.117 **53. Do the possible outcomes of a special verdict deter people from pleading the defence, and if so, why?**[96]

2.118 **54. Do consultees consider that those who might plead insanity understand the range of disposals available and their implications?**

[94] R D Mackay, B J Mitchell and L Howe, "Yet More Facts about the Insanity Defence" [2006] *Criminal Law Review* 399, 407.

[95] See R D Mackay: "Mental Disability at the Time of the Offence" in L Gostin and others, *Principles of Mental Health Law and Policy* (2010) pp 734 to 735.

[96] It will again be interesting to see the results of Professor Thomas's work in progress for us on the jury and on public attitudes to mental disorder and to crime and dangerousness.

2.119 **55. Do consultees have experience of cases in which a defendant was convicted and received a criminal penalty, but in view of his or her mental condition it would have been more appropriate for him or her to have pleaded insanity?**

Does it matter in practice, whether someone is convicted or found insane?

2.120 Some might argue that, as long as the "right" outcome is reached, it does not matter whether a person is convicted or found not guilty by reason of insanity. So, for example, if a person with a mental illness is convicted of a violent offence, as the court can make a hospital order, he will be sent to hospital, and it is not important whether that was following a conviction or a special verdict.

2.121 We believe it is important as a matter of principle that criminal responsibility should be correctly ascribed. Doing so, through operation of the law, reflects society's judgment and attribution of blame. It is not just a matter of accurately communicating by means of a verdict what conclusion a court has reached about a person's culpability (what is described as "fair labelling"), though that is important too.

2.122 It is also important that the law distinguishes fairly between those who should be held responsible and those who should not because of the practical consequences. There are differences between the consequences of a conviction and of a special verdict. A further obvious difference between conviction and special verdict is that a person who is convicted has a criminal record. There are significant consequences for a person who has been convicted of an offence which someone who has been found not guilty by reason of insanity does not have to face. A conviction can be cited in subsequent criminal proceedings. It can have an effect on a sentence for a subsequent offence.[97] Unlike a conviction, a verdict of not guilty by reason of insanity cannot be relied upon as an aggravating

[97] Section 143(2) of the Criminal Justice Act 2003 provides that when considering the seriousness of an offence which has been committed by an offender with more than one previous conviction, each previous conviction – where it is recent and relevant – must be treated by the court as an aggravating factor. This provision replaces s 151 of the Powers of Criminal Courts (Sentencing) Act 2000 which still remains relevant for offences committed before 4 April 2005. Section 151 provides that a court may take into account any previous conviction of the offender or any failure to respond to previous sentencing. Under s 122 (partially in force) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the court must impose a life sentence on a defendant who is convicted of an offence listed in sch 15B of the Criminal Justice Act 2003 and who has already been convicted of an offence listed in part 1 of sch 15B) and satisfies certain conditions, unless there are particular circumstances which would make it unjust to do so.

factor when it comes to sentence in subsequent criminal proceedings. There are also implications for disclosure to employers[98] and enhanced record checks.[99]

2.123 In some other respects, a special verdict has the same effect as a conviction. For example, ancillary orders such as a Sexual Offences Prevention Order may be imposed. When it comes to the question of bail in any future criminal proceedings, a special verdict may have the same significance as a conviction.[100]

2.124 **56. Are consultees aware of cases in which these other consequences have influenced a defendant's decision on entering an insanity plea? Please provide details**.

Subsequent reoffending

2.125 Whether a defendant is convicted or receives a special verdict is significant for the general public, in particular in terms of the possible effect on the likelihood of that individual reoffending. There is a paucity of research on the reoffending rates of those who are released from a secure hospital, but such research as there is indicates a lower reoffending rate for those who are discharged from a secure hospital than for those who are released from prison.[101] Studies of reoffending rates do not distinguish between offenders with mental illness who committed offences due to their mental illness and a wider population of offenders with mental illness. It is, however, arguable that treatment (in hospital or in the community) is likely to have a bigger impact on lowering reoffending rates for those who offended as a result of their mental disorder than on a more general category of convicted offenders with mental health problems.

[98] For the purposes of the Rehabilitation of Offenders Act 1974 a reference to a conviction does not include a "finding linked with a finding of insanity": s 1(4). See also Police Act 1997, s 112. This is only partially in force. A basic certificate which details any unspent convictions is not yet available from the Criminal Records Bureau.

[99] The Protection of Freedoms Act 2012 will make changes to the disclosure of criminal records when it comes into force. These changes would not prevent the disclosure of a finding of not guilty by reason of insanity in an enhanced criminal records certificate, but they may mean that it would be more difficult for a chief officer to justify its inclusion.

[100] Bail Act 1976, s 2(1)(b).

[101] Most recent figures suggest that 40% to 50% of offenders released from prison reoffend within a year, as compared with reoffending rates of 5.8% within two years for those discharged from hospital (figures for the period 2000 to 2008 and 1999 to 2007 respectively): Ministry of Justice, *Compendium of Reoffending Statistics and Analysis* (2010). These figures cannot be relied on too much because there could be a number of factors which differ from one group as compared with the other. Reoffending rates given by the Centre for Mental Health in 2007 for those released from hospital were 7%, but those figures covered people who had been prisoners and then transferred to hospital: M Rutherford and S Duggan, *Forensic Mental Health Services; Facts and Figures on Current Provision* (2007). There is also a study from 2004 which indicates a higher rate of reoffending following release from high security hospitals.

2.126 Following a conviction the court is not going to be primarily concerned with the offender's welfare but with making a decision on a suitable punishment for the crime. We suggest that some of those people who are convicted are so affected by a mental or physical condition that it is not fair to hold them criminally responsible for what they did. If we then consider that pool of individuals who ought to have been found not to be criminally responsible but are currently imprisoned, we are interested to know:

2.127 **57. Are consultees aware of research into the likelihood of reoffending following imprisonment as compared with the likelihood of reoffending if the offender had instead received treatment either in hospital or as part of a supervision order?**

(7) Disposal in the magistrates' court: section 37(3) of the 1983 Act

2.128 The magistrates' courts powers to deal with defendants with a mental or physical condition are found at section 37(3) of the 1983 Act and section 11(1) of the Powers of Criminal Courts (Sentencing) Act 2000.

> (1) Where a person is convicted before the Crown Court of an offence punishable with imprisonment other than an offence the sentence for which is fixed by law, or is convicted by a magistrates' court of an offence punishable on summary conviction with imprisonment, and the conditions mentioned in subsection (2) below are satisfied, the court may by order authorise his admission to and detention in such hospital as may be specified in the order or, as the case may be, place him under the guardianship of a local social services authority or of such other person approved by a local social services authority as may be so specified.

2.129 An order under section 37(3) does not depend on a finding of insanity or unfitness, rather it depends on a finding of mental illness or severe mental impairment. Where section 37 of the 1983 Act[102] is satisfied, the magistrates' court has the power to impose a hospital order in circumstances where an accused has elected trial in the Crown Court.[103] It is uncertain whether a section 37(3) order can be made *after* an acquittal.[104] It is also unclear whether there can be a section 37(3) order which is then *followed by* an acquittal.[105]

[102] See s 37(2) of the 1983 Act.

[103] *R v Ramsgate Justices, ex p Kazmarek* (1985) 80 Cr App Rep 366.

[104] There are some grounds for thinking this point is not settled: compare *R v Horseferry Road Magistrates' Court, ex p K* [1997] QB 23 with *R v Kesteven Justices, ex p O'Connor* [1983] 1 All ER 901, 904 and see the commentary on *ex p K* at [1996] 3 *Archbold News* 1 and 3.

[105] *R (Singh) v Stratford Magistrates' Court* [2007] EWHC 1582 (Admin), [2007] 1 WLR 3119 at [37], by Hughes LJ.

2.130 **58. How do magistrates' courts approach these issues? Do they create problems in practice?**

2.131 Section 11(1) of the 2000 Act empowers the magistrates' court to order a medical report on a defendant's physical or mental condition when he or she is being tried for a summary offence and the court is satisfied that he or she did the act or made the omission charged. This of course assumes that the defendant is being tried or is about to be tried at the time the disorder is, or becomes, apparent.[106] There is now some authority that a trial can be converted to a fact-finding exercise under the 2000 Act.[107]

2.132 **59. Does section 11 of the 2000 Act work well in practice?**

2.133 If the defence of insanity is successful at trial in the magistrates' court, then the defendant would be acquitted and no hospital order could be made. The magistrates also lack the power to commit a person to the Crown Court to determine whether a restriction order needs to be imposed even where they deal with him or her by way of section 37(3) of the 1983 Act.[108]

2.134 **60. Do the limited powers of the magistrates' court create problems in practice? Please provide details.**

(8) The risk of breach of the ECHR

Victims' rights

2.135 A person's rights to life (article 2), not to be subjected to inhuman and degrading treatment (article 3) and to a private life (article 8) could all be breached by a criminal act. This means that there are duties on the state to prevent breaches.

2.136 The European Court of Human Rights has confirmed that states:

> Have a duty to protect the physical and moral integrity of an individual from other persons. To that end, they are to maintain and apply in

[106] The wording of s 11(1) of Powers of Criminal Courts (Sentencing) Act 2000 is clear: "if, on *a trial* … the court shall adjourn the case" (emphasis added).

[107] *Crown Prosecution Service v P* [2007] EWHC 946 (Admin), [2008] 1 WLR 1005, by Smith LJ. See CP 197, paras 8.42 to 8.54 for a discussion of this decision.

[108] Magistrates can commit a person to the Crown Court for a restriction order to be attached in respect of a hospital order following a conviction: s 43 of the 1983 Act.

practice an adequate legal framework affording protection against acts of violence by private individuals.[109]

2.137 The "right to life" contained in article 2 of the ECHR requires the state to protect its citizens from those people who represent a risk of life-threatening harm to others. The law regulating pleas of insanity and the disposal powers of courts must ensure that dangerous individuals are managed in such a way as to address the risk, including the possibility of detention in prison or hospital. The same point applies in relation to people's rights under articles 3 and 8.

2.138 Detention in hospital could in some cases contribute to the fulfilment of the state's duties if treatment makes it less likely that the individual will reoffend: reoffending rates are seemingly lower for those released from secure hospital than from prison.

2.139 For example, in one case a man had been convicted of violent acts and threats towards his estranged wife. The court took the view that due to his personality disorder he ought to be treated in hospital rather than sent to prison, but failed to order the hospital to detain him and treat him. The result was that he was released and made further threats against the woman and others, and the state had failed in its duty to the victim under article 8.[110]

2.140 This duty on the state means that adequate powers ought to be available in relation to offences which are summary only – meaning that they can only be tried in the magistrates' courts – as well as in relation to offences which can be tried in the Crown Court. For example, a stalker might commit an offence contrary to section 2 or section 2A of the Protection from Harassment Act 1997 (summary only offences). If a special verdict or a power to make a hospital order, or to make a supervision order with a treatment requirement if that was appropriate, was not available in the magistrates' courts, the potential victim could be left without adequate protection against harm and violation of his or her article 8 right.

2.141 **61. Are consultees aware of examples from similar cases in which ECHR challenges have been made? Please provide details.**

[109] *Hajduová v Slovakia* App No 2660/03 at [46] citing *X and Y v The Netherlands* [1986] 8 EHRR 235 (App No 8978/80) at [22] and [23]; *Costello-Roberts v UK* [1995] 19 EHRR 112 (App No 13134/87) at [36]; *DP v UK* [2003] 36 EHRR 14 (App No 38719/97) at [118]; *MC v Bulgaria* [2005] 40 EHRR 20 (App No 39272/98) at [150] and [152]; and *A v Croatia* (55164/08) 14 Oct 2010 at [60].

[110] *Hajduová v Slovakia* App No 2660/03 at [48] to [52].

Defendants' rights

2.142 The insanity defence leads to some people who suffered serious mental illness at the time of their offending being detained in custody because they have not pleaded insanity when they could have done, or because they would not satisfy the M'Naghten test. In consequence, they are at greater risk of suicide and self-harm in prison. The state, which owes duties to those held in custody and especially to those held in custody who suffer from mental illness, risks violations of their right to life (article 2). Children who are detained in custody are, of course, extra vulnerable.

2.143 The same argument applies in relation to the right not to be subjected to inhuman and degrading treatment (article 3) because someone who is held in custody may suffer harm short of death. In *Keenan v United Kingdom*,[111] the European Court of Human Rights found that a lack of psychiatric advice about K's confinement in segregation, and ineffective monitoring of his condition amounted to a breach of article 3.

2.144 **62. Are consultees aware of similar cases?**

(9) Equality and discrimination

2.145 The right of a person with mental disorder not to suffer unlawful discrimination is stated in, and may be derived from, a variety of legal instruments, both domestic and international.[112]

2.146 We think that, because of the current interpretation of the M'Naghten test, a person with a disability within the meaning of section 6 of the Equality Act 2010 may be put at a disadvantage, as compared with a person without a disability. This can amount to unfair indirect discrimination contrary to section 19 of the Equality Act 2010. The disabled person who cannot plead insanity will face additional hardships in securing parole (and may therefore end up serving a longer sentence).

[111] (2001) 33 EHRR 38 (App No 27229/95). Mark Keenan suffered from serious mental illness, probably schizophrenia. He had acute psychotic episodes with paranoia. He was charged with assault and remanded into custody. He was subsequently released on bail, convicted, and sentenced to four months' imprisonment. He was known to be potentially suicidal. He assaulted prison staff. Nine days before the end of his sentence he was ordered to serve seven days' segregation and a further 28 days' extra sentence for a breach of prison discipline. Whilst serving the additional term he committed suicide.

[112] On the international front, see, eg, the UN Convention on the Rights of Persons with Disabilities; Council of Europe Recommendation Rec (2004) 10; the International Covenant on Civil and Political Rights; and the EU Charter of Fundamental Rights.

2.147 The proportion of people in custody with learning difficulties is higher than the proportion of people in the general population with learning difficulties.[113]

2.148 **63. We are interested to hear of examples of the insanity defence operating unfairly against people with learning disability.**

(10) The impact on children

2.149 It is a statutory requirement for a court to have regard to a child's welfare,[114] and it is stated in the United Nations Convention on the Rights of the Child that the best interests of the child shall be a primary consideration.[115] In addition, the European Rules for Juvenile Offenders Subject to Sanctions or Measures, adopted by the Council of Europe in 2008, set out:

> Important principles to be followed by states in their treatment of juveniles. These include a requirement that the imposition and implementation of sanctions or measures be based on the best interests of the juvenile, be subject to the principle of proportionality, ie depend on the gravity of the offence committed, and take account of the child's age, physical and mental well-being, development, capacities and personal circumstances.[116]

2.150 We therefore give particular consideration to the position of children with mental illness and learning disabilities/learning difficulties.

2.151 It seems to us that the way the insanity defence is currently framed means that children with learning difficulties and learning disabilities will be as (un)likely as a child without these disabilities to plead insanity successfully. However, as a recent report of research into the views of 208 Youth Offending Team staff indicates, the child with these difficulties/disabilities, once convicted, may be more likely to receive a custodial sentence and so is at a particular disadvantage compared to the child without disability:

[113] The proportion of people in the general population with learning disabilities can be assumed to be around 2%: study commissioned by the Department of Health cited by E Emerson and C Hatton, *People with Learning Disabilities in England* (Centre for Disability Research Report, 2008) p i. A study of three prisons found that just under 7% of the prison population were assessed as learning disabled and over one quarter as borderline learning disabled: K Edgar and D Rickford, *Too Little Too Late* (Prison Reform Trust, 2009) p 29.

[114] Children and Young Persons Act 1933, s 44.

[115] Article 3(1). The Convention was ratified by the United Kingdom in 1991.

[116] Council of Europe Commissioner for Human Rights, *Children and Juvenile Justice* (2009) para 2.4.

> Participants said that children with mental health problems and ADHD were five times more likely to receive a custodial sentence than children without such impairments; that children with learning disabilities were around two and a half times more likely to receive a custodial sentence; and that children on the autistic spectrum were around twice as likely to receive a custodial sentence.[117]

2.152 **64. Is there a particular problem as regards youth defendants in that the orders a court could make, if an insanity defence succeeded, would not produce the outcomes which are seen as being in the defendant's interests, or in the public interest?**

(11) English law is out of step with mental health initiatives

2.153 English criminal law is also out of step with the policy direction endorsed by the Bradley report:[118]

> A new vision for mental health that would strongly support the offending population [arising from the insight that] failure to adequately address the mental health needs of offenders is a fundamental cause of the chronic dysfunction of our criminal justice system.[119]

2.154 Lord Bradley has said that the criminal justice system should aim to have "the right people in prison for the right reasons", and the Ministry of Justice's commitment, as part of the "Rehabilitation Revolution", to exploring initial proposals for treating mentally ill and drugs offenders in the community, supports the Bradley approach.

2.155 **65. Are there practical problems caused by the mismatch between the criminal law's approach and the broader criminal justice initiatives for dealing with the mentally ill?**

[117] J Talbot, *Seen and Heard* (Prison Reform Trust, 2010) p 52. The research was a questionnaire of youth offending team staff and the results are their opinions as to how likely it is that these children will get custodial sentences.

[118] At the request of the then Lord Chancellor and Secretary of State for Justice, Lord Bradley led an independent inquiry into diversion of offenders with mental health problems or learning disabilities away from prison into other more appropriate services. His report was published in April 2009.

[119] The Bradley report, p 12.

PART 3
AUTOMATISM

THE PRESENT LAW

3.1 As noted above, automatism provides a complete defence to any charge where a person performed the allegedly criminal act when he or she was not consciously in control of his or her body (unless he or she has culpably brought about the state of involuntariness). Examples given in the case law and textbooks include where a person "became unconscious while driving; for example, if he were struck by a stone or overcome by a sudden illness; or the car was temporarily out of control by his being attacked by a swarm of bees".[1]

3.2 The defence also applies to acts done while suffering concussion, under hypnosis, or while under the effect of anaesthetic[2] as well as in cases of diabetics who suffer a blood sugar crash (hypoglycaemia),[3] and people acting while suffering from Post Traumatic Stress Disorder.[4]

PROBLEMS WITH THE PRESENT LAW

(1) Automatism – sane and insane

3.3 As noted, English case law has drawn a distinction between "insane automatism" (which it classifies as "insanity") and "sane automatism". It has done this by distinguishing between whether the cause of the lack of control was due to an "internal factor" (ie some malfunctioning of the person's body) or an "external factor" (such as a blow to the head). Involuntary conduct caused by an "internal factor" will be classed as a disease of the mind and can only give rise to a defence of insane automatism (ie insanity).

3.4 When the issue of automatism is raised, the judge must decide whether a proper evidential foundation for the defence has been laid before leaving the issue to the jury.[5] The judge may also have to consider whether the defence should be put as one of insanity, rather than sane automatism.

1 *Kay v Butterworth* (1945) 61 TLR 452, 453, by Humphreys J.

2 See *Quick* [1973] QB 910, 922, by Lawton LJ.

3 For example, *Quick* [1973] QB 910. Other conditions may also lead to hypoglycaemia: "those with liver disease and poor nutrition are prone to low blood sugar". Dr J Rumbold, "Diabetes and Criminal Responsibility" (2010) 174(3) *Criminal Law and Justice Weekly* 21, 21.

4 *T* [1990] *Criminal Law Review* 256.

5 *Stripp* (1979) 69 Cr App Rep 318; *Bratty* [1963] AC 386, 413; and see *Moses v Winder* [1981] RTR 37.

3.5 This problem is a significant one because the interrelationship between the two defences means that any reform must consider both defences if it is to provide coherent proposals.

3.6 Automatism arising from some purely external physical factor other than the accused taking substances (for example, where the defendant has been stung by a wasp while driving, or struck by a stone thrown up from the road surface causing a reflex action).[6] The accused suffering a blow to the head causing concussion is another example.[7] If successful, this leads to a not guilty verdict for any offence charged.

3.7 **66. Are consultees able to provide examples of how the automatism defence applies in such cases in practice?**

3.8 Automatism arising from a disease of the mind (for example, epilepsy) results in a special verdict.[8] However, we consider that there may also be cases of automatism arising from an internal malfunctioning of the body which do not constitute a disease of the mind (for example, the defendant suffers an unexpected transient attack of cramp causing a reflex action). Logically, this should result in a complete acquittal unless the accused was at fault in inducing or failing to avoid the loss of control. Such cases are very rarely found in the law reports.

3.9 **67. Are consultees able to provide examples of whether the automatism defence has been applied in such cases in practice?**

3.10 The internal/external distinction applied by the courts to differentiate insane and sane automatism fails to provide a coherent approach to cases where the loss of control is attributable to external factors that are non-physical in nature. The most obvious examples are those in which the defendant suffers a loss of control at the time of the offence because he or she acts in a dissociative state due to some emotional trauma. For example, in *T*[9] it was argued that the defendant had been raped three days prior to the robbery with which she was charged and that this had caused her to enter a dissociative state in which she had no control over her actions. The trial judge relied on the Canadian case of *Rabey*[10] in which it was held that the reaction of a normal person to external factors which were part of

6 See Pearson J in *Hill v Baxter* [1958] 1 QB 277, 286; *Kay v Butterworth* (1945) 61 TLR 452 per Humphreys J. These examples are frequently used in the academic literature. See eg H L A Hart, *Punishment and Responsibility* (1968) p 96.

7 See Viscount Kilmuir LC in *Bratty* [1963] AC 386, 403; Lord Diplock in *Sullivan* [1984] AC 156, 172 to 173; *Budd* [1962] *Criminal Law Review* 49; *Revelle v R* (1981) 2 CR (3d) 161, 166; *Minor* (1955) 15 WWR 433, Sask CA; and *Donald* (2000) WL 571272 (defence failed).

8 See eg *Sullivan* [1984] AC 156; see also *Cottle* [1958] NZLR 999.

9 [1990] *Criminal Law Review* 256.

10 [1980] 2 SCR 513.

"the ordinary stresses and disappointments of life" could not give rise to a defence of sane automatism and that Rabey's actions (attacking a young woman who had rejected his advances) must therefore have been caused by a disease of the mind. The judge in *T*, took the view that rape was different: it "could have an appalling effect on any young woman, however well-balanced normally" and thus could be classified as an external factor giving rise to a defence of sane automatism.

3.11 **68. Are consultees able to provide other examples of the automatism defence being applied in such cases?**

(2) Lack of clear definition

3.12 The automatism defence is not to be found in any statute but is part of the common law of England and Wales. There is no clearly accepted definition. Various formulations can be found in the case law,[11] though they all focus on action without consciousness, or involuntary movement or action without control of the mind. For example, one oft quoted passage is:

> An act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion; or an act done by a person who is not conscious of what he is doing, such as an act done whilst suffering from concussion or whilst sleep-walking.[12]

3.13 It is surprising to find no clear and agreed definition for a defence that leads to a complete acquittal for any crime.

3.14 **69. Does the lack of clear definition give rise to problems in practice?**

(3) When is the defence applicable?

3.15 There is disagreement between academic commentators as to whether automatism is a denial of mens rea or actus reus. Clearly that would affect the circumstances in which it was available. If the "defence" is really a denial of mens rea it would be available only in relation to offences with mens rea elements and not to strict liability crimes.

3.16 Our view is that it is best seen as a denial of responsibility, as Professor Hart explained:

[11] As summarised on behalf of the Attorney General in *A-G's Reference (No 2 of 1992)* [1994] QB 91.

[12] *Bratty* [1963] AC 386, 409, by Lord Denning. Though sleepwalking was subsequently held to be a "disease of the mind": see Burgess [1991] 2 All ER 769, [1991] 2 QB 92.

> What is missing in these cases appears to most people as a vital link between mind and body; and both the ordinary man and the lawyer might well insist on this by saying that in these cases there is not "really" a human action at all and certainly nothing for which anyone should be made criminally responsible however "strict" legal responsibility might be.[13]

3.17 **70. Does the application of the automatism defence in cases of strict liability give rise to problems in practice?**

(4) The degree of conscious control required

3.18 The common law definitions of automatism fail to provide whether the defendant must have lost all conscious control of his or her actions and how long the loss of control must have lasted in order to be able to rely on a defence. It is, at least, abundantly clear that the defence is not satisfied by proof only that the defendant cannot remember the incident alleged to constitute a crime.

3.19 Although the case law is not entirely consistent the overwhelming weight of the recent authority[14] supports the view expressed by Lord Taylor CJ:

> The defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough.[15]

3.20 The requirement of a total loss of control for the defence of sane automatism is in contrast to the position for insane automatism where the relevant loss of capacity must be either that the defendant did not know the nature and quality of his or her act, or that if he or she did, he or she did not know that it was wrong. Clearly, there will be cases in which a defendant continues to exercise some degree of control over his movements while lacking these capacities. He or she will nevertheless be entitled to rely on a defence of insane automatism (if the cause was internal), but with that same lack of capacity he or she would not be entitled to rely on a plea of sane automatism.[16]

3.21 **71. Are consultees aware of this requirement for a complete loss of control giving rise to difficulties in practice? Please provide examples.**

[13] H L A Hart, *Punishment and Responsibility* (1968) p 107.

[14] *Watmore v Jenkins* [1962] 2 QB 572, 587, by Winn J; *A-G's Reference (No 2 of 1992)* [1994] QB 91, 105, by Lord Taylor CJ.

[15] *A-G's Reference (No 2 of 1992)* [1994] QB 91, 105, by Lord Taylor CJ.

[16] A diabetic who has not taken insulin and slipped into a hyperglycaemic coma would be allowed to plead insane automatism despite retaining some control; a diabetic who took insulin and went into a hypoglycaemic state would not be able to plead sane automatism unless totally incapacitated.

3.22 The case law is also unclear on whether this requirement for a "complete destruction of voluntary control" is applicable no matter what kind of offence is charged or whether it applies only with regard to road traffic offences. Early cases in which the court seemed not to require a complete loss of control (for example, *Charlson*[17]) have not been followed.[18] The recent case law in which the courts repeatedly impose a requirement of total loss of control do all involve road traffic offences and there seems little doubt that policy lies behind the courts' adoption of the strict approach in such cases.[19] Nevertheless, we consider that the total loss of control requirement applies in all cases of automatism and not merely those involving road traffic offences.

3.23 **72. We would welcome examples of recent cases in which the automatism defence has been successfully applied in cases other than those involving road traffic offences.**

(5) Self-induced automatism

3.24 If the defendant was responsible for the state of sane automatism in which he or she committed the offence, then he or she may be prevented from relying on the defence. This involves the so-called prior fault principle, which provides:

> A self-induced incapacity will not excuse … nor will one which could have been reasonably foreseen as a result of either doing or omitting to do something, as for example taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin.[20]

3.25 The law in this area is complex. It rests on a series of common law principles involving the law governing insanity, automatism and intoxication. We summarise the principles here, with the warning that such summaries are not intended to provide a definitive statement of the law.

(1) Where the defendant has suffered a total loss of control owing to involuntary intoxication (for example, someone has slipped drugs in his orange juice), he will be acquitted of any crime committed while in that automaton state.

[17] [1955] 1 WLR 317, [1955] 1 All ER 859.

[18] *Watmore v Jenkins* [1962] 2 QB 572, 587, by Winn J; *A-G's Reference (No 2 of 1992)* [1994] QB 91, 105, by Lord Taylor CJ.

[19] *Moses v Winder* [1981] RTR 37.

[20] *Quick* [1973] QB 910, 922, by Lawton LJ. See also *C* [2007] EWCA Crim 1862, [2007] All ER (D) 91.

(2) Where the defendant's automatism was self-induced (for example, he voluntarily took prohibited drugs and became so intoxicated as to lose all control) and the offence that the law classifies as one of specific intent (for example, theft).[21] The accused will be entitled to be acquitted provided that he or she satisfies all the other elements of the automatism defence.

(3) Where the crime charged is one which the law classifies as one of "basic intent", the defendant may rely on the automatism defence as long as in taking the drug, he or she did not deliberately take a risk that his or her actions would result in a loss of control. Thus the accused will be entitled to an acquittal where he or she has taken a substance in a way which was, or which he or she honestly believed was, in compliance with a medical prescription.

(4) Where the crime charged is one which the law classifies as one of "basic intent", and the defendant's incapacity arose out of taking dangerous drugs or drinking alcohol there will be a presumption that he or she was deliberately taking a risk that his or her actions would result in a loss of control. The defence of automatism will fail.

(5) In all other cases of self-induced incapacity (for example, hypnosis) the defendant will be entitled to an acquittal on the basis of automatism, providing he or she has not been reckless as to losing capacity.

3.26 The complexity of these cases is obvious, but that flows from the technical nature of the law governing intoxication and that lies beyond the scope of this project.

3.27 One aspect of the law we are particularly keen to discover more about is the operation of the automatism test in cases where the defendant has voluntarily taken medication. The defence of automatism is denied any defendant who has been *subjectively* reckless about the risk that he or she might lose control as a result of doing so when charged with a basis intent offence (ie he or she has personally foreseen the risk of losing control). In *Bailey*,[22] the diabetic defendant was charged with a basic intent offence (maliciously inflicting grievous bodily harm) after taking insulin and suffering a hypoglycaemic attack. In reaching its conclusion that he was not reckless about losing control, the court highlighted the fact that there was no evidence that he knew of the risk since the fact that not taking food after insulin could have such effects was "not … common knowledge, even among diabetics".

[21] We define specific intent offences as those for which the predominant mens rea is one of knowledge, intention or dishonesty, and basic intent offences as all those for which the predominant mens rea is not intention, knowledge or dishonesty (this includes offences of recklessness, belief, negligence and strict liability).

[22] [1983] 1 WLR 760, 764 to 765, by Griffiths LJ.

3.28 **73. Can consultees provide examples of cases in which automatism pleas have been made based on defendants having taken intoxicants or medication?**

(6) The burden and standard of proof

3.29 The defence of automatism is only left for consideration by the tribunal of fact if the judge determines that a proper evidential foundation for the defence has been laid.[23] This will usually involve medical evidence. The judge may also have to consider whether the defence should be put as one of insanity, rather than sane automatism.

3.30 Once an evidential basis has been laid the onus is on the prosecution to disprove the defence, to the criminal standard requiring that the jury is sure of its verdict.[24]

3.31 **74. Does the fact that the burden of proof rests on the prosecution in automatism create difficulties in practice? If so, please provide examples.**

The burden of proof where both the defences of insanity and sane automatism are in issue

3.32 The distinction between insane and sane automatism means that if the defence being pleaded is one of sane automatism, the defendant must satisfy an evidential burden in raising the defence, but the burden lies on the prosecution to disprove it, to the criminal standard. If, however, the defendant raises the defence of insanity (including insane automatism), then the burden of proving that defence falls on the defendant, on the balance of probabilities.[25]

3.33 In practical terms, this can make a direction to the jury complicated, as in *Roach*.[26] The defendant, who was charged with causing grievous bodily harm with intent to do so, raised the defence of automatism while the prosecution argued that, if there was any automatism it was of the insane kind. Psychiatrists called by the defence gave their opinion that the defendant had no mental illness but was suffering from an anti-social personality disorder. In their view the most likely diagnosis was "insane automatism of psychogenic type". It was held on appeal that both forms of defence should have been left to the jury, from which it follows that the trial judge should have directed the jury that:

[23] *Stripp* (1979) 69 Cr App Rep 318; *Bratty* [1963] AC 386, 413; and see *Moses v Winder* [1981] RTR 37.

[24] See *Bratty* [1963] AC 386; *Burns* (1973) 58 Cr App Rep 364; *Roach* [2001] EWCA Crim 2698, [2001] All ER (D) 98.

[25] *Quick* [1973] QB 910.

[26] [2001] EWCA Crim 2698, [2001] All ER (D) 98.

(1) In considering the defence of (sane) automatism the burden was on the prosecution to disprove, but in considering the defence of insane automatism the burden was on the defence to prove, and different standards of proof applied, so that:

(2) If the prosecution had not made the jury sure that the defendant was not acting in a state of automatism, the jury should acquit;

(3) If the prosecution had made them sure that the defendant caused the grievous bodily harm but the defendant had persuaded them that it was more probable than not that he was acting in a state of automatism caused by a disease of the mind then they should give a verdict of not guilty by reason of insanity; and

(4) If the prosecution had made them sure that the defendant caused the grievous bodily harm and that he intended to do grievous bodily harm, then they should convict.

3.34 **75. Does this difference in burdens between insane and sane automatism create difficulties in practice? Please provide examples.**

(7) Disposals and public protection

3.35 Those who are found not guilty by reason of insanity are subject to the disposals discussed above (paragraph 2.104). Where the plea is one of sane automatism, the only verdict is one of guilty or not guilty.

3.36 The case law reveals numerous examples of serious harms caused by those in a state of automatism.[27] There is a potential problem of public protection following an acquittal on the ground of automatism. Under the current law, a person who is acquitted on the ground of automatism may have caused harm and the situation might be one which would recur, as with a diabetic failing to eat after taking insulin. The court has no powers to take steps for the protection of the public if a person is acquitted.[28]

3.37 **76. We are interested in whether the present law provides adequate public protection. Do consultees have experience of cases in which a defendant successfully pleaded insanity or sane automatism where there was an obvious risk of recurrence of his or her criminal behaviour? What was the outcome?**

[27] *Sullivan* [1984] AC 156 and Kemp [1957] 1 QB 399 for example.

[28] In some circumstances a restraining order may be made following an acquittal, and a defendant who is charged with a driving offence may be obliged to give up his or her driving licence, but these are specific remedies available only in some circumstances, and do not address any underlying medical condition.