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Abstract

This article will consider whether the current common law defence of insanity is ineffective and in need of reform. It will do so by contemplating several criticisms of the insanity defence arising from the *M'Naghten Rules* and examine some recommended changes to the law this area.

Keywords: defence of insanity, *M'Naghten Rules,* Mental Health Acts 1983 and 2007

Introduction

The concept of insanity as a defence was established in the early the eighteenth century by *Arnold's Case*. Tracy J established that:

> [A] man that is totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a brute, or a wild beast, such a one is never the object of punishment.[2]

Although the concept of legal insanity was further developed in the late eighteenth century in *Hadfield*,[3] the standard test of criminal liability in relation to mentally disordered defendants in common law was only formed after the case of *M'Naghten*.[4] This case accepted the previous principles and established that a special verdict of

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[2] *Arnold's* Case (1724) 16 St.Tr. 695.
[3] *Hadfield's* Case (1800) 27 St.Tr. 1281.
[4] *Daniel M'Naghten's* Case (1843) 8 ER 718.

'not guilty by reason of insanity' (NGRI) should be delivered whenever there is evidence of total lack of 'understanding and memory due to a morbid inherent condition of the brain.'[5]

Over the years, academics have identified many conspicuous flaws and uncertainties surrounding the insanity defence. First, the out-dated terminology of the *M'Naghten Rules* is considered a significant drawback. At present, the rules cover miscellaneous crimes in England and Wales, including non-mental illnesses and conditions such as epilepsy, diabetes and sleepwalking. Consequently, many argue that the insanity defence has 'lost much of its raison d'être.'[6]

The fact that the statutory definition of mental disorder under s1 of the Mental Health Act (MHA) 1983 – amended by the MHA 2007 – has not always been consistent with the legal concept of 'disease of the mind' under the *M'Naghten Rules* further exacerbates matters. The concept of 'disease of the mind' is far-fetched and includes non-mental bodily diseases under medical terms; this problem was initially apparent in the case of *Kemp*[7]. Currently, a person suffering from severe mental disorder, such as psychopaths, may not always fall under the scope of insanity.

In murder cases, most defendants prefer to seek alternative defences such as diminished responsibility and non-insane automatism. It may also be difficult to determine whether the defence is of insane or non-insane automatism, which further attenuates the shaky grounds of the insanity defence. Article 5(1) of the European Convention on Human Rights (ECHR) protects the right to liberty and security of person. However, Article 5(1)(e) allows the lawful detention of persons of unsound mind. People who suffer from epilepsy or diabetes can still fall under the *M'Naghten Rules*; this contradicts Article 5(1)(e), because the English and Welsh courts accept that these defendants are of unsound mind when they are not. The aforementioned issues portray the insanity defence as weak and in need of reform. This article will consider these, as well as recommendations for reform of the insanity defence.

[5] *R* v *Sullivan* [1984] 1 AC 156, p.164.
[6] Ramage, S., 'Peter Young's insanity plea: a retrospective examination of the verdict of "not guilty on the ground of insanity"', (2008) 183 *Criminal Law Review* 1-6, p. 3.
[7] *R* v *Kemp* [1957] 1 QB 399.

1 Insufficiencies of the M'Naghten rules

The M'Naghten Rules

On January 20 1843, Daniel M'Naghten shot Edward Drummond, who died on April 25th. M'Naghten was suffering from morbid delusions at the time of the shooting. The House of Lords contemplated the nature and extent of the unsoundness of mind which would excuse the commission of a felony on the 6th and 13th March 1843.[8] The judges were responsible for guiding the jury on what kind and degree of insanity would constitute a defence.[9] The court established that a defence on the ground of insanity could only be raised after the accused had proven that, at the time of the crime, he or she was suffering such a defect of reason (from disease of the mind) as not to know the nature and quality of his or her action or, if he did know it, that he was unable to distinguish its wrongfulness.

The question of moral responsibility

M'Naghten was decided when the law was still at a rudimentary stage.[10] Today, the rules set out in the case face many criticisms, the major one being that the second limb of the *M'Naghten Rules* – a defendant did not know 'he was doing what was wrong' – only covers 'wrong' in the legal sense and does not encompass moral wrongness, which many have argued makes the second limb insufficient.[11] This problem was exposed in *R* v *Windle*,[12] where a strict approach was taken towards the wrongness limb.[13] In that case, the defendant killed his suicidal wife by giving her a dose of some 100 aspirin tablets. When he was arrested, he told 'the police that he supposed he would be hanged for it.'[14] Lord Goddard described the defendant's psychiatric condition as 'a form of communicated insanity known as folie à deux.'[15] Nevertheless, he ruled that a man suffering from a defect of reason may still be liable if he knew that what he was doing was contrary to law.[16] This principle was also followed in *Johnson*,[17] where the trial judge withdrew the insanity defence from the jury. Psychiatrists in *Windle* agreed that at the time of the offence, the defendant

[8] HL Deb Vol. 67 cols. 288, p.7 .
[9] *M'Naghten*, *op. cit.*, p.722.
[10] Bridge, N., 'Presumptions and Burdens', (1949) 12 *Modern Law Review* 273, p.287.
[11] Mackay, D., 'Righting the wrong? Some observations on the second limb of the M'Naghten Rules', (2009) 2 *Criminal Law Review,* p.87.
[12] *R* v *Windle* [1952] 2 QB 826.
[13] Mackay, *op. cit.*, p.81.
[14] *Windle*,*op. cit.*, p.830.
[15] *Ibid.*
[16] *Ibid.*, p.832.
[17] *R* v *Johnson (Dean)* [2007] EWCA Crim 1978.

knew that what he had done was against the law – despite the fact that one of the psychiatrists considered that the defendant did not know that his actions were morally wrong, a factor which was disregarded.

Doubt has been cast on the principle set out in *Windle* in a number of overseas jurisdictions.[18] In *Stapleton*,[19] the High Court of Australia concluded that *Windle* was wrongly decided as the question was whether the defendant knew that he was wrong according to the ordinary principles of reasonable men rather than wrong as being contrary to law. In *Chaulk*,[20] the Supreme Court of Canada stressed that 'wrong' must mean more than just legally wrong.[21] The court established that a person suffering from a disease of the mind may know that it is legally wrong to kill but he may still kill 'in the belief that it is in response to a divine order and therefore not morally wrong.'[22] The question of whether such people should be exempted from criminal responsibility has been raised by academics. Howard links criminal responsibility and irrationality in terms of conduct, emotions and attitude,[23] arguing that in order to be labelled insane, a person should act irrationally due to a defect in his 'autonomous working mind.'[24] He also supports the argument espoused by Moore that only individuals who can appreciate moral principles can be seen as rational and only rational moral agents can be responsible in law.[25]

The wide scope of 'disease of the mind'

The concept of 'disease of the mind' is not totally compatible with the statutory definition of mental disorder under the MHA 1983. The MHA focuses on facilitating treatment of serious mental disorder, whereas the insanity defence aims to excuse criminal responsibility of mentally disordered defendants.[26] Over the years, disease of the mind has had diverse interpretations. In *Kemp*,[27] the defendant hit his wife with a hammer while suffering from arteriosclerosis. Although the defendant raised non-insane automatism as a defence, Devlin J directed the jury to the insanity defence. He held that hardening of the arteries was capable of a temporary or permanent

[18] Mackay, *op. cit.*,p.87.
[19] *R* v*Stapleton* (1952) 86 CLR 358.
[20] *R* v *Chaulk* [1990] 2 CR (4th) 1.
[21] *Ibid*., p.41.
[22] *Chaulk, op. cit.*, p.42.
[23] Howard, H., 'Reform of the insanity defence: theoretical issues', (2003) 67(1) *Journal of Criminal Law* 51-67, p.51.
[24] *Ibid.*
[25] Moore, M., *Law and Psychiatry: Rethinking the Relationship*, (1984), p.244.
[26] Baker, E., 'Human Rights, M'Naghten and the 1991 Act', (1994) *Criminal Law Review* 84-92, p. 88.
[27] *R* v *Kemp* [1957] 1 QB 399.

defect in the mind, and was therefore a 'disease of the mind' within the scope of the *M'Naghten Rules*. The court established that 'disease of the mind' did not distinguish between diseases of the mind and body, rather it was there to prevent the phrase 'defect of reason' from including defect of reasoning caused simply by brutish stupidity without rational power. Devlin J further explained that 'there is... no general medical opinion upon what category of diseases are properly to be called diseases of the mind.'[28]

The fact that the courts use the phrase 'disease of the mind' unrestrictedly was further apparent when defendants suffering from epilepsy and diabetes were covered by the *M'Naghten Rules*. In *Bratty*,[29] the defendant strangled an 18 year-old girl. Medical practitioners submitted that the defendant was probably suffering from psychomotor epilepsy and, if he was, it was a defect of reason due to disease of the mind. The judges accepted this view and stated that only the insanity defence was available to the defendant. Lord Denning reasoned that 'any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind.'[30]

In *Sullivan*,[31] the defendant was suffering from a seizure due to psychomotor epilepsy when he kicked a man in the head and body. He was charged with inflicting grievous bodily harm with intent. Medical professionals claimed that Sullivan was suffering from the third, or post-ictal, stage of the seizure, in which he was unconscious and unable to control his movements. The defence put forward non-insane automatism, arguing that the defendant had acted unconsciously and involuntarily in kicking the victim and was therefore not insane. However, since the defendant's seizure was marked by 'the discharge of electrical impulses into the brain which had reacted on centres controlling its functions, one of which is memory',[32] psychomotor epilepsy was classified as a disease of the mind. The 'mind' of the *M'Naghten Rules* was used in the ordinary sense of the mental faculties of reason, memory and understanding; the court stated:

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

[28] *Ibid*., p.406.
[29] *Bratty* v *Attorney-General for Northern Ireland* [1963] AC 386.
[30] *Ibid*., p.413.
[31] *R* v *Sullivan* [1984] 1 AC 156.
[32] *Ibid*., p.160.

intermittent, provided that it subsisted at the time of commission of the act[33] The judges directed the jury to deliver a special verdict of NGRI instead. Not wanting to be labelled insane, Sullivan changed his plea to guilty of assault occasioning actual bodily harm. He then appealed on the basis that the judge should have left the defence of non-insane automatism to the jury. Although the appeal was allowed, the previous decision was upheld. In *Sullivan*, the court further widened the scope of disease of the mind by differing from *Bratty* and establishing that it was neither necessary for a mental disorder to be prone to recur nor manifest itself in violence.

During the appeal, defence counsel argued that insanity only covered defective reasoning and defective intellect, which did not include the absence of reasoning or intellect and in medical terms, epilepsy was not a disease of the mind. It was also argued that it could not be said that the defendant did not know the nature and quality of the act when he did not even know that he was acting in anyway. It was the seizures that were unwillingly moving him, and his actions were a result of muscular spasm, uncontrolled by his brain. Contrary to the defence counsel's argument, Lawton LJ found that there may be a defect of reason whether or not reason has been suspended, stating 'one cannot distinguish between suspension of reason and maloperation.'[34] Lord Diplock also defended the *M'Naghten Rules* by claiming that the jurors of the 1980s would understand the first limb to mean that 'he did not know what he was doing.'[35] Nevertheless, the court did acknowledge the unfair effects of the *M'Naghten Rules*, stating that 'it is an offence to common sense and sensibilities to dub as insane a sufferer from psychomotor epileptic seizures.'[36]

Today, the insanity defence includes psychiatric and neurological conditions as well as purely physical disorders like diabetes.[37] In *Hennessy*,[38] the defendant was charged with taking a motor vehicle without consent. He was suffering from hyperglycaemia resulting from a failure to take his insulin for two or three days, due to depression and stress. It was held that hyperglycaemia caused by high blood sugar levels was an internal factor, therefore an inherent defect that was a disease of the mind.[39] The case of *Quick*[40] can be distinguished from *Hennessey*, although the

[33] *Ibid*., p.172.
[34] *Ibid*., p.160.
[35] *Ibid*., p.173.
[36] *Ibid*., p.168.
[37] Rumbold, J., 'Diabetes and criminal responsibility', (2010) 174(3) *Criminal Law and Justice Weekly*, p.21.
[38] *R* v *Hennessy* [1989] 1 WLR 287.
[39] *Ibid*., p.293.

defendant in *Quick* was also a diabetic. The defendant was a nurse who attacked a patient and inflicted actual bodily harm while in a hypoglycaemic state. He had not eaten a sufficient amount of food to neutralise the injected insulin, consuming alcohol instead. This was seen as an external factor, and therefore it was not a disease of the mind: the defendant had been reckless. He consumed alcohol when he was medically advised not to. He knew the possible consequences and therefore could not be exempted from criminal liability. The court concluded that he could not rely on non-insane automatism, but he did not have to plead insanity.

As such, someone who neglects their condition by not eating properly may be acquitted by reason of non-insane automatism, whereas someone who neglects their condition by not injecting insulin may be found NGRI,[41] even though both may have acted in the same way with the same state of mind.[42] The distinction seems bizarre and unfair; the unsatisfactory nature of the law in the area of insanity is apparent.[43] Rumbold has found that arrests of diabetics suffering from hypoglycaemia occur regularly.[44] For instance, in *Davies,*[45] a lorry driver killed three people in an accident due to hypoglycaemia. It was found that he had been involved in a similar accident six years ago. This raises the question of to what extent the justification for the varying conviction rules is viable when people suffering from hypoglycaemia are just as likely to be dangerous to the public as people suffering from hyperglycaemia.

Psychopathy

Within the scope of disease of the mind, serious mental disorder does not necessarily negate responsibility.[46] There have been legal debates about psychopathy being a mental disorder, with some defining mental disorder as 'the harmful impairment of rational capacities.'[47] Emotional abilities which are involved in practical reasoning, such as the capacity to appreciate moral and immoral values, are also included. Psychopaths are seen as lacking this capacity, which as a result may cut them off from the evaluative human instincts. This definition may encompass psychopathy as a mental disorder; however, the Criminal Justice and Licensing

[40] *R* v *Quick* [1973] QB 910.
[41] Rumbold, *op. cit.*, p.22.
[42] Jones, H., 'Insanity, automatism, and the burden of proof on the accused', (1995) 111 *Law Quarterly Review* 475-516, p.499.
[43] *Ibid.*
[44] Rumbold, *op. cit.*, p.22.
[45] *R* v *Davies (John Watkin)* [2001] EWCA Crim 2319.
[46] Baker, *op. cit.*, p.87.
[47] Shaw, E., 'Psychopaths and criminal responsibility', (2009) 13 (3) *Edinburgh Law Review* 497-502, p.500.

(Scotland) Bill has described psychopathy as 'a personality disorder which is characterised solely or principally by abnormally aggressive or seriously irresponsible conduct.'[48] The definition is therefore purely criminal rather than medical;[49] it does not allow psychopaths to avoid criminal liability. Scottish Law excluded psychopathy from mental non-responsibility and justified it on the basis that psychopathy is a volitional disorder that does not eliminate self-control.[50] Volitional disorder may not fall under the *M'Naghten Rules* because it is presumed that psychopaths know the nature and wrongfulness of a criminal conduct.[51] However, the fact that 'psychopathy can indeed impair cognitive abilities'[52] – which as a result may give rise to a defect of reason and hinder their ability to appreciate the nature, quality and the wrongfulness of the act – is disregarded.

The Institute of Psychiatry at King's College, London carried out a study that compared the brain anatomy of nine diagnosed psychopaths to that of a controlled ordinary group of people.[53] Brain regions concerned with emotional responses, such as the amygdala, and the orbitofrontal cortex (OFC), involved with higher decision making of the diagnosed psychopaths, were found to have greater abnormality. Hence, it was established that there was a connection between specific brain regions and psychopathy.[54] Psychopathy was consequently purported as a mental disorder; however, it does not fall under the insanity defence.[55] It was established in *Kemp* that the law is concerned with the mind (the mental faculties of reason, memory and understanding) rather than the brain. It may be contested that an abnormality of the brain, such as the study refers to, may have the capacity to affect the mental faculties of reason, memory and understanding, and therefore prevent the person from apprehending the nature and quality of the act and its wrongfulness. For instance, it has been asserted that psychopaths lack emotional empathy therefore they may be less scrupulous after conducting unlawful action. Therefore, a psychopath may naturally disregard the nature, quality and wrongfulness of an act.[56] The other

[48] *Ibid.,* p.497.
[49] *Ibid.,* p.498.
[50] *Ibid.,* p.500.
[51] *Ibid.*
[52] *Ibid.*
[53] Henderson, M., 'Brains of psychopaths are different, British researchers find', *The Times*, August 2009: http://www.timesonline.co.uk/tol/news/uk/crime/article6736973.ece
[54]Alleyne, R., 'Psychopaths are born not bred, according to a new study', *The Telegraph*, 1 April 2011: http://www.telegraph.co.uk/science/science-news/5979198/Psychopaths-are-born-not-bred-according-to-a-new-study.html
[55] *Ibid.*
[56] Haji, I., 'On psychopaths and culpability', (1998) 17(2) Law & Philosophy 117-140, p.124.

important question to consider is, 'should psychopaths be able to avoid punishment and criminal responsibility due to their cognitive deficiencies, since it would defeat the purpose of a safer society'? Elliott has suggested that without the understanding of morality and empathy, one cannot be held responsible for one's offenses.[57] However, in many cases this notion has caused public outrage. For instance, in *McMilan*,[58] the defendant was sentenced to life imprisonment after pleading guilty to the manslaughter of Shirley Cotton-Betteridge. The victim's parents questioned the legal system for not isolating the defendant from the community when he was already seen as a highly dangerous sex offender.[59] Some argue that psychopaths do not act out of ignorance and in fact they freely do 'morally reprehensible' deeds, and should be blameworthy and criminally liable.[60] Also, psychopaths may commit unlawful actions even if they know what they are doing is wrong, suggesting that it may be right to hold psychopaths criminally liable. Can psychopathy be included in the insanity defence? If it can, would it be fair to relieve them from criminal responsibility? This dilemma further undermines the credibility of the insanity defence in its current state.

2 Is the Defence of Insanity Actually Desired?

Reluctance of defendants to plead insanity

The scant use of the insanity defence represents its ineffectiveness. There were only 15 findings of not guilty but insane in 2001.[61] The death penalty has long been abolished in the UK, therefore most defendants do not choose to rely on the insanity defence, especially when there are other defences that have more favourable outcomes. In England and Wales, it is rare that a defendant will choose to plead insanity if he is charged with murder since serving a finite sentence is seen as more favourable. Research shows that the plea of insanity increased after the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, in which the forms of disposal were expanded from just indefinite and indeterminate hospitalisation – as was the case under the Criminal Procedure (Insanity) Act 1964 – to the court attaining discretion (except in murder charges). Mackay summarised the changes as follows:

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[57] *Ibid.*
[58] *R* v *McMilan (Paul)* [2005] EWCA Crim 222.
[59] BBC News, 'Anger as psychopath gets life sentence', *BBC News Website*, October 2002: http://news.bbc.co.uk/1/hi/england/2333325.stm
[60] Haji, *op. cit.*, p.134.
[61] Howe, L., Mackay, R., Mitchell, B., 'Yet more facts about the insanity defence', (2006) *Criminal Law Review* 399-411.

> To order admission to hospital without the equivalent of restrictions; or make a guardianship order under the Mental Health Act 1983, or a supervision and treatment order, or an order for an absolute discharge of the accused.[62]

However, such an increase has not been so apparent in murder cases. Mackay found that under the 1964 Act, murder had accounted for almost one third of the cases,[63] but this reduced to only four cases (9.1%), after the first five years of the 1991 Act and to seven cases (9.7%) in 2006.[64] The automatic restriction order that results from an NGRI verdict for murder stands as a major disincentive.[65]

Diminished responsibility

The insanity defence goes hand in hand with the defence of diminished responsibility under s52 Coroners and Justice Act 2009. Similar to the phrase 'disease of the mind' under the *M'Naghten Rules*, the phrase 'recognised medical condition' is used for diminished responsibility. It is capable of encompassing all relevant mental disorders, including both 'psychological' and 'physical" conditions'.[66] As a result, it includes conditions like epilepsy, sleeping disorders and diabetes; this means that if a defendant's abnormality of functioning was a result of such medical conditions and led him or her killing someone, they might prefer the partial defence of diminished responsibility – and be convicted for manslaughter rather than be detained in a mental institute indefinitely. Some grounds of diminished responsibility are very similar to the insanity defence; for instance, s52(1A)(a) states that the defendant must 'not to know the nature and quality of the act he was doing'. Indeed, statistics have shown that there were higher numbers of defendants relying on diminished responsibility than the insanity defence. In 2005, diminished responsibility was the basis of 39 cases and there were 19 convictions in 2005/06 for manslaughter on the grounds of diminished responsibility.[67] This number is much higher than Mackay's findings of defendants pleading insanity to a charge of murder.

However, the scope of diminished responsibility has become narrower. In order to satisfy the *M'Naghten Rules*, the only necessary requirement is that a 'disease of the mind' causes 'a defect of reason'.[68] There is no additional need to prove that the 'disease of the mind' caused or was a significant contributory factor in causing the

[62] *Ibid.,* p.400.
[63] Howe, et. al., *op. cit.*, p.248.
[64] *Ibid.*, p.402.
[65] *Ibid.*
[66] Howe, et. al., *op. cit.*, p.294.
[67] Home Office, *Homicides, Firearm Offences and Intimate Violence 2006/07*, (2008), p.15.
[68] *M'Naghten*, p.210.

defendant to carry out his conduct, which is necessary under s52(1B), where an abnormality of mental functioning should provide an explanation for the defendant's conduct. Diminished responsibility states that the partial defence will fail if the jury believes that the defendant 'would have killed anyway and the impairment would not have affected their behaviour during the killing.'[69] Hence, it may be more plausible for the defendants to rely on the insanity defence. For instance, if a defendant's mental state during unlawful conduct satisfies all the elements of both pleas but not the causal requirement, then it is more likely that he will succeed under the insanity defence.[70]

Non-insane Automatism

In most cases, it is also possible to raise an alternative defence of sane automatism while insane automatism is being raised. In the case of *Charlson*,[71] the defendant hit his 10 year-old son on the head with a hammer and threw him into a river. He was charged with causing grievous bodily harm with intent, and with unlawful wounding. The evidence pointed to the possibility that Charlson was suffering from a cerebral tumour, which had caused 'a motiveless outburst of impulsive violence'[72] over which he had no control. The insanity defence was not raised and the defence of non-insane automatism was raised instead. Barry J directed the jury that 'if he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs'[73] then the proper verdict is 'Not Guilty'. In *Bratty*,[74] automatism was defined as the state of a person who, although capable of action, was not conscious of what he was doing (an unconscious involuntary action), which therefore is a defence because the mind is not in sync with what is being done.[75] In *Hill* v *Baxter*,[76] Devlin J ruled that if the cause was not a disease of the mind and was merely the result of a temporary loss of consciousness arising accidentally, then it would be reasonable to hope that it will not be repeated and it would be safe to acquit the defendant.[77] This outcome resulting from a defence of non-insane automatism is certainly an attractive alternative. As such, defendants choose to first rely on this defence rather than insanity when their case is likely to

[69] Howe, et. al., *op. cit.*, p.298.
[70] *Ibid.,* p.300.
[71] *R* v *Charlson* [1955] 1 WLR 317.
[72] *Ibid*., p.318.
[73] *Ibid*., p.326.
[74] *Bratty* v *Attorney-General for Northern Ireland* [1963] AC 386.
[75] *Ibid*., p.401.
[76] *Hill* v *Baxter* [1958] 1 QB 277.
[77] *Ibid*., p.285.

satisfy either one of the three elements: it is an external cause, an unconscious action or self-induced automatism.

Few cases have exposed the difficulty of separating a cause as internal or external, evidently blurring the line between sane and insane automatism. This was apparent in the case of *T*,[78] where the court contemplated the question of whether post-traumatic stress resulting from the defendant being raped was an external or internal factor. Conflicting psychiatric opinions may also make it difficult to differentiate. For instance, in *Wiseman*,[79] a psychiatrist called by the defence testified that an accused charged with the murder of her two children had committed the killings in a 'dissociative state'. He maintained that a series of shattering emotional experiences had led her to take unconscious involuntary actions. However, two other psychiatrists gave evidence suggestive of insanity. Such cases may arise when there is evidence that points to a disease of the mind, insanity, and sane automatism. Consequently, it may be difficult to classify what particular factors are 'responsible for the alleged involuntariness'[80] and this further questions the equivocal premises of the insanity defence.

Article 5(1)(e) and persons who suffer from epilepsy and diabetes

Article 5(1)(e) of the ECHR offers broad possibilities to detain a variety of different groups without the need for conviction of a criminal offence.[81] The court must consider the conditions set out by *Winterwerp*,[82] in order to determine whether the detention of the groups mentioned under Article 5(1)(e) is justified or not. In *Winterwerp,* the Strasbourg Court held that the domestic law relating to the detention of persons under Article 5(1)(e) must conform to three criteria:

> (1) a true mental disorder must be established before a competent authority on the basis of objective medical expertise; (2) the mental disorder must be of a kind or degree warranting compulsory confinement; and (3) the validity of the patient's continued detention depends upon the persistence of such a disorder. As to (2), Member States enjoy a certain margin of appreciation, for example as to whether to allow detention of people who are not dangerous to self or to others.[83]

[78] *R* v *T* [1990] *Crim LR* 256.
[79] *R* v *Wiseman* (1972) 46 ALJ 412.
[80] Jones, *op. cit.*, p.506.
[81] 'Detention of untreatable psychopaths and Article 5 of the European Convention on Human Rights' (2002) 10(1) *Med. L. Rev* 92-99, p.96.
[82] *Winterwerp* v *The Netherlands* (1979) 2 EHRR 387.
[83] *Ibid.*

Under the original 'admission orders' of the 1991 Act, hospitalisation of those who were not mentally disordered was permitted if they were found NGRI or unfit to plead. This can be seen as inconsistent with Article 5(1)(e). People suffering from epilepsy or diabetes who are covered by the *M'Naghten Rules* do not satisfy all the criteria in *Winterwerp*. They are not actually suffering from a mental disorder because the medical definition of mental disorder does not include people suffering from such diseases. The fact that the English and Welsh system puts people with such conditions in the same category as criminals like serial killers or psychopaths seems quite unfair. This was asserted by critics, who claim that 'the current law unfairly encompasses medical conditions such as epilepsy, which affects nearly half a million people in Britain.'[84]

However, the Domestic Violence, Crime and Victims Act 2004 was introduced in order to make amendments to the 1991 Act. Sections 24 and 5A of the 2004 Act certified that there must be medical evidence which could justify detention in hospital on the grounds of the defendant's mental state, namely a mental disorder within the MHA 1983 before a hospital or restriction order can be made even in consideration of murder charges.[85] Hence, such an Act is a step towards protecting minority groups like diabetics and epileptics.

3 Possible reforms

This article has outlined significant weaknesses in the insanity defence; unsurprisingly there have been attempts to amend it. The Butler Committee on Mentally Abnormal Offenders proposed a new verdict of 'not guilty by reason of mental disorder' in 1975. The Committee recommended that the defence should be available where mental disorder negated the requisite *mens rea* for an offence and where the defendant was suffering from severe mental disorder at the time of his actions.[86] The proposal, if accepted, would have included psychopathy and no longer label epileptics or diabetics as insane, perhaps easing the reluctance of minority groups to utilize such a defence. The Committee held that causality between the mental disorder and conduct should remain so that psychiatrists could only state facts without deciding on criminal responsibility.[87] A clear, clinical description of facts would supposedly prevent juries from confusing medical definitions of mental illness

[84] BBC News, 'Children at risk?', *BBC News Website*, July 2008: http://news.bbc.co.uk/1/hi/programmes/law_in_action/7483194.stm
[85] Howe, et. al., *op. cit.*, p.408.
[86] Howard, *op. cit.*, p.51.
[87] Williams, G., *Criminal Law: The General Part* (1961), p.445.

with conditions which excuse defendants from responsibility. For instance, clause 35(2) of the Draft Criminal Code allows the prosecution to show whether the offence was attributable to the disorder or not, and in the cases of defendants not knowing that the conduct was morally wrong, the inability should be to such an extent as to render the defendant permanently unable to form a moral dialogue.[88] It also outlines what should be included under the scope of 'severe and permanent mental condition'.[89]

Slobogin has proposed 'an intermediate position', a partial abolition of the defence, which would allow a defendant suffering from a mental disorder to use the disorder in support of his claim for a defence of duress, self-defence or absence of *mens rea*.[90] For instance, if a defendant mistakenly believes that he will be killed if he does not act in a certain way due to a mental disorder, he should be entitled to a defence of duress rather than insanity. The defendants should be directed to other defences if possible. This is the case in most murder charges, where defendants voluntarily choose to rely on defences other than insanity. Hence, perhaps such a partial abolition could work.

Howard suggests that the insanity defence should be based on an actor's irrationality and his capacity to be a moral agent. Then, the medical evidence should be used to establish whether the defendant's condition hindered him from being rational. Slobogin states that perhaps a rationality test could be formed which would include compulsion if it gives the basis for an individual's irrationality.[91] Fingarette further proposes that the rationality notion could include cognitive and volitional criteria.[92] It cannot be stated that the aforementioned reform strategies are perfect, but they do try to improve the insanity defence. Lastly, courts should have more discretion over deciding what category of people are seen as dangerous, and measures should be imposed on that particular group accordingly rather than applying strict measures towards everyone.[93]

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[88] Howard, *op. cit.*, p.51.
[89] *Ibid.*, p.51.
[90] Slobogin, C. 'An End to Insanity: Recasting the Role of Mental Illness in Criminal Cases', (2000) 86 *Virginia Law Review*, p.1199.
[91] *Ibid.*
[92] *Ibid.* Fingarette's phrase – 'the individual's mental makeup at the time of the offending act was such that, with respect to the criminality of his conduct, he substantially lacked capacity to act rationally (to respond relevantly so far as criminality is concerned)'
[93] Baker, *op. cit.*, p.90.

Conclusion

The 'exceptional and incongruous position of the defence of insanity'[94] has led to many criticisms of the *M'Naghten Rules*. The rules include epileptics and diabetics, but not the people who think what they do is morally right but legally wrong, as well as psychopaths who probably should be deemed as insane. The flexibility of disposal created by the 1991 Act has made the insanity defence more adaptable and approachable;[95],however, the fact that many are still reluctant to use the defence indicates that perhaps the defence should be used in exceptional cases only. Also, the fact that some may still support the judgment of Wilson J in *Chaulk* – who stated that it is better for a guilty person to be found insane than an insane person be convicted of a crime – makes the notion of abolishing the insanity defence unacceptable. It cannot be denied that it is difficult to determine the level of mental abnormality that ought to confer a status exemption, but it is really up to Parliament to decide on whether any reforms should be introduced or not.[96] Again, as long as both courts and Parliament hold that it is more important to protect the community from dangerous individuals than protect the rights of a small group of defendants,[97] the insanity defence will continue to exist even with inadequacies.

[94] *Thomas* v *The Queen* (1960) 102 CLR 584, p.603.
[95] Howe, et. al., *op. cit.*, p.410.
[96] Baker, *op. cit.*, p.90.
[97] *Ibid*., p.92.