INSANITY PLEA: A RETROSPECTIVE EXAMINATION OF THE VERDICT OF "NOT GUILTY ON THE GROUND OF INSANITY"

by

Sally Ramage

Abstract

This paper argues that insanity should be eliminated as a separate defence, but that the effects of mental disorder should still carry significant moral weight in that mental illness should be relevant in assessing culpability only as warranted by general criminal law doctrines concerning mens rea, self-defence and duress. This study was triggered by the case *R v Central Criminal Court, ex parte Peter William Young*[1] . Peter Young had been charged with dishonestly concealing material facts contrary to s47 (1) Financial services Act 1986. The case considered Peter Young's intentions, not in relation to dishonesty, and not in relation to the purpose of the making of the representations, but as to the state of the defendant's intention in relation to the facts. Leave to Appeal to the House of Lords was refused.

Literature Review on English 'insanity' caselaw

No analysis of a legal issue is complete without a literature review of the subject. Stephen Gilchrist wrote a short article in 1999[2] in which he discussed the Court of Appeal decision in *R v Antoine*[3] in which the defence of diminished responsibility under s.2 Homicide Act 1957 applied. In the year 2000, Sean Enright[4] wrote a one-page review on the power to commit defendants acquitted on the grounds of insanity to a mental institution for an unlimited period. He reviewed two cases R *v Maidstone Crown Court, ex parte Harrow London Borough Council [200]* and *R v Crown Court at Snaresbrook, ex parte Director of the Serious Fraud Office [1997].* In 2001, Richard Campion reviewed fitness to plead and the use of the defence of provocation[5].regarding fitness to plead and the use of the defence of provocation, in light of the case *R v Heather Grant* [2001].In the years 2003 and 2004, there were short editorial pieces in the Criminal Law Review Journal[6] the latter featuring the Scottish Law Commission's 2003 Report on Insanity and Diminished Responsibility. There followed a short five page article in the Criminal Lawyer in 2005[7], followed by a one page piece in the Solicitors Journal[8] and a good paper in the European Human Rights Law Review[9] and a 4-page review in the Criminal Law Review Journal in 2006[10]. Finally a paper appeared in Modern Law Review Journal in 2007[11].This scarcity of literature on English

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[1] *R v Peter William Young* [2002] EWHC 548(Admin)

[2] S.Gilchrist "Crime reporter", Solicitors Journal SJ Vol.143 No.19 Pages 463, 468, 14/5/99.

[3] *R v Antoine* (1999)

[4] S. Enright, "Crime brief", New Law Journal NLJ Vol.150 No.6940 Pages 897-898, 16.6.2000.

[5] "Crime reporter", Solicitors Journal SJ Vol.146 No.5 Page 112, 8.2.2002.

[6] Editorial, "Reforming the insanity defence", (Crim. L.R. 2003, Mar, 139-140Crim. L.R. 2003, Mar, 139-140). See also, Editorial, "More on reform of insanity and diminished responsibility", Criminal Law Review Crim. L.R. (2004) September Pages 681-682.

[7] S.Ramage, "Crooks and culpability: a study of fraud and fraudsters", The Criminal Lawyer, Criminal Lawyer Crim. Law. (2005) No.157 Pages 3-8.

[8] J. Mackie, "Life in crime", Solicitors Journal S.J. (2005) Vol.149 No.14 Page 416. Considers the abolition by the Domestic Violence, Crime and Victims Act 2004 s.22 of the right to jury trial on the issue of fitness to plead

[9] I. Loveland, "Execution of insane prisoners in the United States", European Human Rights Law Review E.H.R.L.R. (2005) No.4 Pages 363-372.

[10] R.D. Mackay and B.J. Mitchell, "Sleepwalking, automatism and insanity", Criminal Law Review Crim. L.R. (2006) October Pages 901-905.

'insanity' cases is quite telling, especially when we see the increase of use of the defence of insanity, as in the author's list below:

A list of English insanity defence cases :-

Re Francis Brereton(1688);Re Thomas Draper(1727) ; R v James Hadfield (1800); R v M'Naghten (1843); R v Oliver Smith[1911]; R v Alexander[1913]; ex parte Woolmington[1935]; R v North[1937]; R v Windle[1952]; ex parte Bratty[1963]; R v Clarke[1972]; R v Patrick Sullivan[1984] ;R v Peter Sutcliff(Yorkshire Ripper)[1990]; R v Burgess[1991];R v Michael Egan [1996]; ex parte Konca[1997]; R v Antoine[1999]; R v Pierre Harrison Antoine[2000]; R v Heather Grant[2001];R v Lambert[2001]; R v Peter William Young[2002];R v David Omara[2004]; ex parte Ferris[2004]; R v Lewis-Joseph[2004];ex parte AL[2004];R v Delroy Lewis-Joseph[2004]; ex parte Stephen Bartram [2004]; ex parte Hasani[2005]; ex parte Longeran[2005]; ex parte Jones[2005]; Narev v Customs & Excise Commissioners[2005]; R v Borkan[2005];R v Susan Shickle[2005];R v Amolok Singh Chal[2007]; ex parte Singh[2007];R v Dean Johnson[2007]; R v Johnson [2007]; and R v Pooley [2007].

The M'Naghten Case

Examining first the famous M'Naghten case, from whence much of current insanity defence jurisprudence derives: in 1841, Daniel M'Naghten killed the secretary of Prime Minister Peel, apparently believing the secretary was Peel and that killing Peel would end a campaign of harassment against him. He was found insane by the trial court judges. Whether M'Naghten would have been acquitted under the proposed approach would depend upon whether he believed the harassment would soon lead to his death or serious bodily harm and whether he thought, there was any other way to prevent that occurrence. Because in his paranoid state he feared he would be assassinated by his enemies and had on several occasions unsuccessfully applied to the police for protection, he may have had such a defence. If, on the other hand, the circumstances in which he thought he was involved would not amount to self-defence, no acquittal would result although a conviction of manslaughter rather than murder might have been appropriate, analogous to the result under the modern theory of "imperfect" self-defence, as it has developed in connection with provocation doctrine. M'Naghten was indicted at the Central Criminal Court for the murder of Edward Drummond, secretary to Sir Robert Peel, by shooting him. He pleaded 'not guilty'. Witnesses were called by the defence to prove that the prisoner was not in a sound state of mind at the time of committing the act. The jury's verdict of "not guilty on the ground of insanity" led to a debate in the House of Lords and to much discussion throughout the United Kingdom.

The M'Naghten case caused debate in the House of Lords and the House of Lords put five questions to the judges: (1) What is the law in regard to alleged crimes committed by persons afflicted with insane delusion in respect to one or more particular subject or persons? An example of this is what is the law in the case of an insane person committing a crime, when the insane person knew that he was acting contrary to law, but committed the crime in order to redress or revenge a supposed grievance or injury, or to produce some supposed public benefit? (2) How should the jury be guided in a case where an insane person is charged with a crime and insanity is set up as a defence? (3) In what terms ought the question to be left to the jury as to the accused's state of mind *at the time when the act was committed*? (4) If a person, under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused? (5) Can a qualified specialist insanity psychiatrist, on first seeing the defendant at trial, this psychiatrist being present for the whole duration of the trial, be asked for his opinion as to the accused's state of mind at the time of the committed act? The question to concentrate on is question (3) above and the answer is illustrated in R *v Clarke*[12].

Although a plea of insanity can be established as a defence under the M'Naghten Rules when it can be certain that the accused was deprived of the power of reasoning due to a disease of mind at the time of the act, the rules have no application in the case of those who retain their power of reasoning, but who, temporarily abandon their reasoning mind when committing the act.

In *R v Clarke*, Mrs. Clark was charged with theft. She admitted taking goods from a supermarket but said that she had no intention to steal and that she had acted in a fit of absent-mindedness and depression, resulting from diabetes. The assistant recorder treated her defence as a plea of not guilty by reason of insanity within the M'Naghten Rules. She then changed her plea to guilty. She was convicted. She then appealed to the Court of Appeal. Justice Ackner said, .*The effect of the evidence on the assistant recorder was to convince him that the*

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[11] A. Loughnan, "Manifest madness": towards a new understanding of the insanity defence", Modern Law Review M.L.R. (2007) Vol.70 No.3 Pages 379-401.

[12] *R v Clarke* [1972] 1 All E.R. 219, Court of Appeal.

defence was in truth a defence of 'not guilty by reason of insanity' under the MNaghten Rules.... However, in our judgement, the evidence fell very far short either of showing that she suffered from a defect of reason or that the consequences of that defect in reason, if any, were that she was unable to know the nature and the quality of the act she was doing. The M'Naghen Rules...never have applied to those who retain the power of reasoning but who in moments of confusion or absentmindedness fail to use their powers to the full.... The appellant in this case ultimately pleaded guilty solely by reason of the assistant recorder's ruling. Since in the view of this court the assistant recorder mis-stated the law, this court has jurisdiction to quash the conviction: see R v Alexander[13]*."* The conviction was quashed. Now to look at other defences of people who commit crimes and who are mentally ill:

The defence of 'Duress'

A subjective version of duress traditionally has excused crimes that are coerced by serious threats to harm the perpetrator. For instance, some people with mental illness who commit crime claim they were commanded by God to do so. If the perceived consequences of disobeying the deity were lethal or similarly significant, such a person would deserve acquittal, perhaps even if the crime charged is homicide. Duress is available only in a very limited number of objectively defined circumstances. Under these defences, the defendant's assertions about his or her feelings at the time of the offense were often not relevant. Evidence of mental illness was not considered pertinent.

The defence of 'lack of mens rea'

The third type of excuse that might apply when people with mental illness commit crime--lack of mens rea–is extremely rare. M'Naghten intended to carry out his criminal act and most crimes in which mental illness plays a role are intentional because the person who is so disordered that he cannot form intent is often also so disorganised behaviourally that he is unlikely to be able to carry out a criminal act. Nonetheless, when *mens rea* is defined subjectively, there are at least four possible "lack-of-mens rea" scenarios- involuntary action, mistake as to results,

mistake as to circumstances, and ignorance of the law.

First, a person may engage in motor activity without intending it to occur, for example, a reflex action which results in a gun firing and killing someone. The criminal law typically classifies such events as involuntary acts. Although mental disorder usually does not eliminate conscious control over bodily movements associated with crime, when it does, for example, in connection with or during unconsciousness or sleep, a defence would exist if one accepts the premise that culpability requires actual intent.

Second, a person may intentionally engage in conduct but intend a different result than that which occurs, such as when firing a gun at a tree kills a person due to a ricochet. Distortions of perception caused by mental illness might occasionally lead to such accidental consequences; for instance, a mentally ill person driving a car may accidentally hit someone because his "voices" and hallucinations prevent him from perceiving the relevant sounds and visual cues. In such situations, a subjectively defined *mens rea d*octrine would absolve him of criminal liability for any harm caused.

Third, is the situation in which a person intentionally engages in conduct and intends the physical result that occurs, but is under a misapprehension as to the attendant circumstances, such as when a person intentionally shoots a gun at what he thinks is a dummy but which in fact is a real person. Of the various *mens rea* defences, mental illness is what has sometimes been labelled the "mistake of fact" defence. For instance, a person who believes he is shooting the devil when in fact he is killing a person or a person who exerts control over property he, under delusion, believes to be his, and would be acquitted of both homicide and theft if *mens rea* were subjectively defined. Another, more subtle example of this third type of *mens rea* defence is most likely to arise in connection with a person who is mentally retarded rather than mentally ill. Like a young child, such a person may kill, not realising that a life has been ended, because of an incomplete conception of what life is. For instance, the offender may believe the victim will rejuvenate like a cartoon character. *Mens rea,* subjectively defined, would be absent in such a case because murder requires not only an intentional killing, but also that the offender understands that the victim is a human being who is capable of dying. Finally, a person may intentionally engage in conduct and intend the result, under no misapprehension as to the attendant circumstances, but still not intend to commit a crime because of an inadequate understanding of what crime is. There are two versions of this type of *mens rea* requirement. First, the person may not be aware of the concept of crime, as might be true of a three-year-old child. Second, the person may understand that criminal prohibitions exist but believe that his specific act is legally permissible, such as might occur when a person

[13] *R v Alexander* [1913] 109 L.T.745

from a different country commits an act that would be legal in his culture, although illegal in English law. The first situation might be called 'general ignorance of the law', while the second might be called 'specific ignorance of the law'. Outside of the insanity and infancy contexts, neither type of ignorance has been recognized as an excuse for *mala in se* crimes.

Were a subjectively defined *mens rea* doctrine to excuse at least general ignorance of the law, whether or not it is due to mental disability, a position which would excuse those rare individuals who intentionally carry out criminal acts without understanding the concept of good and evil, then this would treat people with mental disorder no differently from people who are not mentally ill, assuming the English criminal justice system adopts a subjective approach to culpability. This is already the case as in *R v Amolok Singh Chal* [14] in which hearsay evidence was allowed, as it would be in a criminal trial in the strict sense. The Appellant had appealed, on the grounds of insanity, against his conviction of causing grevious bodily harm with intent. The facts of the case are that without reason, Amolok Singh Chal had hit the victim over the head with a sledgehammer, causing the victim to be in a persistent vegetative state and another person present as a witness, was declared mentally disabled but his statement to the police was treated as admissible evidence. This was the grounds of the appeal. However, the appeal was dismissed on the grounds that the original trial was a criminal proceeding because Criminal proceedings can mean "the determination of guilt and the imposition of a penalty" as well as "all proceedings in the criminal procedure framework and ancillary proceedings that did not of themselves result in a criminal conviction of punishment". Therefore, the trial judge had the power to admit the witness statement whether or not s. 134 of the 2003 Criminal Justice Act applied, but also on the basis that "the court should adopt the same rules of evidence as in a criminal trial".

Historically, the insanity defence was the only method of mitigating culpability for unreasonable actions but now that other aspects of criminal law doctrine have taken on this role, the defence has lost much of its *raison d'etre*. The scope of the insanity defence began expanding at the same time as developments in other parts of the criminal law rendered the original defence redundant in many respects. Mentally disordered individuals should not be excused. This is seen to be the case in *R v Johnson*[15] . The facts in Johnson are that Johnson forced his way into a flat of a man who was watching television and for no apparent reason, stabbed him with a large kitchen knife. The victim managed to call an ambulance, by which time Johnson had gone to a friend and kicked down his friend's door where he threatened his friend's father but eventually left. He was later arrested and charged with wounding with intent and grevious bodily harm. At his trial, he claimed he did not know what he was doing. Although Johnson was suffering from paranoid schizophrenia at the time he stabbed the man, the judge determined that there was no proper basis on which the jury could consider the question of insanity and the jury returned a guilty verdict in relation to the wounding count. Johnson appealed on the ground that the judge was not entitled to preclude from the jury the possibility of returning a verdict of not guilty by reason of insanity. However, on a strict reading of settled authority relating to the application of the M'Naghten Rules, the judge had been entitled to preclude from the jury the possibility of returning a verdict of not guilty by reason of insanity.

Similarly, in *R (on the application of Hasani) v Blackfriars Crown Court.*[16] It was found that if an accused person was found to be unfit to plead under s 4 of the Criminal Procedure (Insanity) Act 1964 but became fit to plead before he was dealt with under s 5 of that Act, the court was not required to follow the procedures in s 4A and 5, providing a further s 4 hearing was held at which the court found the accused person fit to plead. The expansion of the insanity defence which has occurred in English law in the past decade, whether it encompasses anyone with an abnormal condition or is limited to those who are viewed as irrational, does not adequately distinguish those we excuse from those we do not. The recent case of *R (on the application of Singh) v Stratford Magistrates' Court*[17] questioned the nature and extent of powers of the magistrates' court under mental health legislation. The case highlighted the procedural differences that can arise between the magistrates' court and the Crown court with an insane defendant. The judge said: "*The CPS sought to argue that the defence of insanity is no longer available in the magistrates' court. Their arguments were based on the approach in the Crown court to a special verdict of not guilty by reason of insanity. In such proceedings, the verdict is arrived at without reference to the issue of intent. In the magistrates' court intent is a live issue*".

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[14] *R v Amolok Singh Chal* [2007] CA (Crim Div) 5/10/07.
[15] *R v Johnson* [2007] EWCA Crim 1987
[16] *ex parte Hasani* 22/12/2005
[17] *ex parte Singh* [2007] All ER (D) 30 (Jul)

English Courts began to differentiate between mental states, so that in the law of homicide, for instance, those whose acts were wanton and willful were treated as being more culpable than those who acted less deliberately. Many crimes were said to require specific intent. Burglary, defined as entering a dwelling with intent to commit theft, requires the specific intent to commit theft. In theory, a person who, because of mental disorder, did not kill "willfully" or did not possess the required specific intent should be acquitted of these types of offenses. In practice, however, the subjectiveness of *mens rea* is limited. Bearing in mind that the insanity defence in English law was developed at a time when no other culpability doctrine mitigated punishment for non-accidental crime, insanity, therefore, was the only possible defence for a mentally ill person who acted "unreasonably" in committing an offense. For such persons, there was no mens rea, provocation or subjective justification plea. Current insanity tests are overbroad because they move too far toward the deterministic *reductio ad absurdum* that no one is responsible. It is overbroad because it fails to explain why irrational reasons are necessarily exculpatory. The development of the modern behavioural sciences has made the criminal law's attempt to draw a coherent line between responsibility and non-responsibility ever more difficult. As long as mental disorder is kept narrowly defined, *as was the case before the advent of modern psychiatry,* this type of claim is not particularly threatening to the legal system.

If we consider the number of mental impairments that fall under the rubric of "character" deficiencies, as distinguished from the psychotic dysfunctions such as schizophrenia and the bipolar disorders that have traditionally formed the basis for the insanity defence, we would need to include a plethora of disorders that fit into this category, including mental retardation, many types of impulse disorders and a larger number of so-called "personality disorders". English law has not sought to clarify this. Many studies show correlations between antisocial behavior and genetic makeup, hormonal imbalances, abnormal EEGs, certain deficiencies in intellectual capacities, and various types of brain dysfunctions and so it is clear that some biological factors do strongly predispose people to commit crime. The number of people afflicted by such physiological problems is substantial.[18] There are also mental impairments that are more clearly caused by external factors such as bad relationships, trauma, and general stress. The "battered women syndrome" is meant to capture this notion. Given their vague contours, the prevalence of such phenomena is hard to estimate, but it is not insubstantial. These various psychological insights pose a significant problem for the English law of insanity as currently structured, because a vast number of people who commit crime can now make a plausible claim that they were significantly impaired by a "mental disorder" at the time of the offence. English law has not yet detailed the issue of psychopathy.

Psychopathy is amorality and affects the issue of moral culpability. The 'Yorkshire Ripper', the serial murderer Sutcliffe, may be classed as a psychopath but was determined not to be insane although there is a body of (mostly American) literature that advocates the view that the emotional deficiency of psychopaths "bears crucially on whether they are blameworthy for their outlawed conduct is substantial." [19]In most cases that are brought to the English court with an insanity defence, the defendants have difficulty in understanding the consequences of their actions. However, in the Peter William Young case, the defendant, at the time he committed the serious fraud, was an extremely intelligent and capably financial expert, making many transactions in the marketplace, consisting of millions of pounds sterling in the English market place. If Peter William Young's action concerning the serious fraud he committed was void because of incapacity, then all his financial transactions on behalf of the Morgan Grenfell City Bank must also be voided.

If Peter Young were deemed insane as per his defence lawyers, then all defendants with moderate mental problems should also claim the insanity defence, defendants such as people with borderline and attention deficit disorder, as well as at least some of those influenced by genetic and environmental factors. In practice, a whole host of non-"mentally ill" criminal actors appears to qualify for the English insanity defence lately. Yet it is a clear and modern medically established fact that personality disorders and conditions do not fit the legal definition of "mental disease or defect", the typical predicate for the insanity defence. Mental disorder should have exculpatory effect when, and only when, its effects lead to a lack of the required *mens rea* or to reasons for committing the crime that sound in justification or duress. 'Ignorance of the law is no excuse' is a well-established practice. Yet it has

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[18] Hence,

Act of Adjournal (Criminal Procedure Rules Amendment No 3) (Miscellaneous) 2007

Summary: SSI 2007/276: New form for insanity case appeals

[19] I.Haji,"The emotional depravity of psychopaths and culpability", Legal Theory, Vol 9, 2003, p 63.

been argued successfully in the English courts that a person who is not cognizant of any of society's constraints cannot justly be held liable for violating those constraints[20]. In medieval times, tests of insanity would excuse a person who is generally ignorant of the criminal law. If it is argued that an insane person is generally not aware of societal prohibitions but intends to commit a crime under actual or imagined circumstances, then his defence cannot amount to self-defence or duress.

Today, in the 'insanity' context, English law has been resistant to ignorance as an excuse for two reasons: evidentiary concerns and a desire to maintain the rule of law by ensuring that legislatures, not criminal actors, define the prohibitions of the criminal law. Even when a claim of specific ignorance is from a mentally ill person, it will normally be incredible in the type of *mala in se* crimes that trigger the insanity defence. For instance, a defendant's claim that he thought killing someone who teased him as justifiable homicide under the law is unlikely ever to be true, except when the claimant is so disordered he is generally ignorant of the law. Even if that is not the case, notions underlying the rule of law counsel against recognizing such a claim.

Abolishing the insanity defence

A reform of English criminal law's approach to mental disorder is needed. 'Insanity' is being used in recent times as an unbounded condition that could apply to any number of people who commit serious crimes in the United Kingdom[21]. The wording of s 4 of the Criminal Procedure (Insanity) Act 1964 means that a jury might only find that a defendant was unfit to plead or unfit to stand trial if there was medical evidence to that effect. Such evidence can be an admission order as in *R v Lewis-Joseph*[22]. People are often outraged by insanity verdicts. Abolition of the insanity defence may have a beneficial impact on society's view of people with mental illness as the insanity defence, by removing the connection between mental illness and crime and non-responsibility.

Restriction Orders in Insanity cases

This paper has argued that the English insanity defence should be abolished.
At present, the English court sometimes enforces a restriction order when it accepts an insanity plea. In *R (on the application of Jones) v Isleworth Crown Court,* [23] a judge, considering whether to impose an order pursuant to para 2(1)(b) of Sch 1 to the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, which was the equivalent to a restriction order under s 41 of the Mental Health Act 1983, was bound to consider the future risk of serious harm to the public if the claimant, who had been found unfit to plead, and the nature of that risk and was not bound to determine the question solely by reason of violence demonstrated by the claimant in the past. Moreover, when deciding whether to make the restriction order the judge was not bound by the view of the claimant's psychiatrist.
In *R (on the application of AL) v Secretary of State for the Home Department,* there was no requirement that an accused originally admitted to and detained in hospital as a result of an order made under the Criminal Procedure (Insanity) Act 1964, s 5(1) (a) could only be recalled and detained where the patient was being found to be suffering from the same form of mental disorder which was the foundation of his original detention in hospital. However, in the Peter Young case, no restriction was placed on him. The issue of insanity as a plea is in the end is really to do with the sentence given to a person who pleads insanity- Should he be set free? Should he be put into a mental institution for life? Should he be put into a mental institution until he is well again and then serve the sentence he should have had for the given criminal act? Should he be permanently treated as insane for all future criminal acts he commits?

Let us see how the courts have dealt with this- A defendant found to have committed the actus reus of an offence, who had as a result been subject to an order under the Mental Health Act 1983 s.37 but who no longer exhibited the symptoms of a mental disorder, could remain subject to the options available under that order

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[20] In *Wilson v Inyang* [1951] 2 All ER 237, Inyang was an African who had lived in the UK for two years and he was charged with wilfully and falsely using the title or description of "physician", contrary to the Medical Act 1858, s40. He was not a registered medical practitioner, but had obtained a Diploma of the British Guild of Drugless Practitioners. He had published an advertisement in which he was referred to as "Naturopath Physician, N.D, and M.R.D.P. The magistrate had dismissed the charge on the ground that he genuinely believed he was entitled to describe himself in the terms used in the ad. At appeal, Lord Justice Goddard upheld the decision.
[21] See *R v Borkan (CA) [2005].*
[22] *R v Lewis-Joseph* (CA)[2004]
[23] 3/3/2005

where he still suffered from the underlying mental disorder. The claimant (B) sought to quash a decision of the defendant magistrates' court to continue his trial on a charge of causing unnecessary suffering to an animal. B suffered from paranoid schizophrenia that had been controlled by medication. B had failed to take his medication and stabbed and killed his dog. The magistrates found that B had committed the *actus reus* of the offence, which offence was one of strict liability precluding any defence of insanity. B was made subject to an order described as an **Interim Hospital Order under the Mental Health Act 1983**. In the event, the order amounted to an order under s.37 of the Act. B's condition then improved to the extent that, whilst still suffering the underlying condition he no longer exhibited the symptoms of it. However, the magistrates' court took the view that B was no longer suffering from a mental disorder and that an order under s.37 of the Act was no longer appropriate. It therefore sought to require B to enter a plea and to continue to try the matter in the usual way.
The appeal court held that the magistrates' court had erred in seeking to continue B's trial as he still suffered from a mental disorder and could still be subject to the options provided for by an order under s.37 of the Act. The psychiatric reports did not state that B was no longer suffering from a mental illness but only that he was no longer exhibiting the symptoms of one. Various options were open to the court when imposing an order under s.37 including a guardianship order under the auspices of the local authority. In those circumstances, the order of the magistrates' court would be set aside with a direction to proceed under s.37 of the Act.

Peter Young was not given a restriction order and neither was Michael Legan subject to one (see *R v Michael Egan).*[24] The English court decided that a person who is held unfit to plead and subjected to a hospital order without a restriction order is not entitled to legal aid for representation on appeal of a finding of fact. *R v Michael Egan* was an appeal, by a person who was found unfit to plead to a charge of theft, from the jury finding of fact, that he had done the act as charged, before Justice McHale at Croydon Crown Court. The appellant appealed against that finding of fact and applied for legal aid for representation at appeal under reg.10 Legal Aid in Criminal and Care Proceedings (General) Regulations 1989. The appellant had been made subject to a hospital order without restriction under s.5 (5) Criminal Procedure (Insanity) Act 1964 and was neither a convicted nor an accused person. Under s.21 Legal Aid Act 1988, he was not accordingly entitled to legal aid. The order had not been coupled with a restriction order so the Secretary of State did not have power to direct the appellant should stand trial if he recovered his faculties so he was not under any threat of being accused of an offence. Legal aid order quashed and appeal dismissed.

Peter Young did not receive a restriction order and The Serious Fraud Office, that is, the public purse, had to pay all legal costs totalling £10 million.

In the case *R v Southwark Crown Court, ex parte Koncar*[25] , Koncar was made the subject of a s.37 hospital order by magistrates can appeal to the Crown Court there is no statutory right of appeal from an order made under s.5 of the Criminal Procedure (Insanity) Act 1964 and the provisions of Sch.1 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. Koncar was admitted to Fulbourn Hospital, Cambridge. The facts of the Koncar case are that on 25 March 1995, Koncar attacked a police officer in the erroneous belief that the officer had killed his girlfriend. Koncar came before the Southwark Crown Court on 21 November 1995. On 20 May 1997, a jury determined that Koncar was a person under a "disability" in accordance with s.4 of the 1964 Act and that Koncar did the act of common assault but the jury acquitted him of affray. On 23 August 1996 the judge made an admission under s.5 of the 1964 Act and Sch.1 of the 1991 Act but declined to make an order imposing general restrictions under para.2(1)(b) of Sch.1 of the 1991 Act which would be equivalent to a s.41 "restriction order" under the Mental Health Act 1983. The Court of Appeal (Criminal Division) has no jurisdiction to entertain an appeal against the decision because the admission order made by the judge was not a sentence pursuant to the provisions of the Criminal Appeal Act. There is no statutory right of appeal against such orders made in respect of an accused person who appears at the Crown Court on an indictment containing allegations of offences triable only on indictment.

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[24] R v Michael Egan [1996] CA (Crim Div) (McCowan LJ, Ognall J, Steel J) 8/10/96

[25] *R v Southwark Crown Court, ex parte KCncar* [1997] 30/7/97

In the case *R v Pierre Harrison Antoine* [2000] HL, it was decided that where a defendant had been found unfit to plead by reason of mental disability, the defence of diminished responsibility (under s.2 Homicide Act 1957) could not apply to a hearing under s.4A (2) Criminal Procedure (Insanity) Act 1964 to determine whether he committed the act charged against him. The House of Lords had to consider whether a person charged with murder was entitled to rely on the defence of diminished responsibility under s.2 Homicide Act 1957 when a jury had found him unfit to plead by reason of mental disability where the trial judge had ruled that in deciding whether an accused was guilty of the offence charged under s.4A (2), a jury must be satisfied of both the actus reus and the mens rea of the offence as per *R v Egan.*[26] Their Lordships decided that once it had been determined by the jury that the accused was under a disability, the trial terminated and the accused was no longer liable within the procedure laid down under s.4A(2) to be convicted of murder.
In *R v Central Criminal Court, ex parte Peter William Young, the* English court decided that it was appropriate for the jury charged with an inquiry under s.4 (a) Criminal Procedure (Insanity) 1964 Act to consider the defendant's intentions and leave to appeal to the House of Lords refused. Application made then made for judicial review of the decision of Jackson J at the Central Criminal Court on 4 September 2001. Peter William Young had been charged with dishonestly concealing material facts contrary to s.47 (1) Financial Services Act 1986. At Young's first appearance, the court was notified that there might be an issue as to Young's fitness to plead, and the judge ruled that the question should be determined under s.4 Criminal Procedure (Insanity) Act 1964.

On 15 December 2000, a jury determined that Young was under a disability. The case was adjourned for a determination under s.4 (a) of the 1964 Act as to whether Young had committed the act alleged. On 4 September 2001, the judge ruled that Young's intention was capable of being a fact, on the basis that the second limb of s.47 (1) (a) of the 1986 Act should be construed broadly, and ruled that investigation of that intention was properly the subject of inquiry by a jury, on the basis that it was not possible to inquire into whether Y had committed the offence without inquiring into his intentions. Young's lawyers, Peters and Peters, argued that s.397 (1) Financial Services and Markets Act 2000 contained the phrase "whether in connection with a statement, promise or forecast made by him or otherwise", which did not appear in s.47 of the 1986 Act; and that it was well established that a criminal offence in relation to positive misstatements of fact did not extend to cover investigations as to intention[27]. Young's lawyers argued that the phrase 'dishonest concealment' was inapt to cover the topic of intention because concealment involved hiding, which was not an apt way of describing what was held in someone's head and that it was not possible for the jury to investigate matters of intention. Their application was dismissed. Pity he was not put under a Mental Act Order, after which he would not have been able to gain the legal aid with which to appeal.

Two years later, in the case *R v Ramzi Borkan*[28] the English court decided that the Criminal Procedure (Insanity) Act 1964 s.4(4)(5) and (6) meant that a jury could only find a defendant unfit to plead or to stand trial if there was medical evidence to that effect. Where medical evidence was to the contrary there was no requirement to have a jury empanelled to make a decision. The facts of Burkan are that Burkan had held his former partner and her friend at knifepoint for several hours. Burken afterwards attended a police station with a legal representative and appropriate adult. He began hyperventilating and was held to be unfit to be interviewed, but fit to be detained. Burkan was released on bail to enable him to obtain a psychiatric report but he broke bail conditions by contacting his former partner and was remanded in custody. A psychiatric report found Burkan *was* fit to enter a plea and stand trial and he pleaded not guilty to the offences. At trial, the jury was discharged, as there were concerns over Burkan's health due to his behaviour in court. Burkan was then was examined by a prison psychiatric doctor who reported that Burkan had some personality problems which had been exacerbated by drug taking, however, there was no evidence of mental illness. He was not detainable under the Mental Health Act 1983 but had emphasised his problems in the hope he would be transferred to hospital. A jury could only find a defendant unfit to plead or stand trial if there was medical evidence to that effect and his
appeal was dismissed.

In the same year 2004, in *R v David O'Mara*[29] a jury had found the applicant unfit to stand trial but the determination was postponed to allow medication and there was subsequent disagreement between doctors as to

[26] *R v Egan*[1998] 1 CAR 121
[27] as in *R v Dent* [1955] 2 QB 590.

[28] *R v Ramzi Borkan* [2004] EWCA Crim 1642

[29] *R v David O'Mara* [2004]CA (Crim Div)

whether the applicant was then fit to stand trial, there was no mechanism under the Criminal Procedure (Insanity and Unfitness to Plead) Act 1964 by which to set aside the finding so the matter had to proceed to determination. That disclosed an unsatisfactory lacuna in the law.

Also in 2004, in the case *Ferris v Director of Public Prosecutions*[30] following a second finding of unfitness to plead it was necessary for the jury to reconsider the issue of whether the accused had committed the actus reus of the offence. If reconsideration was required, the jury should not be informed of the earlier jury finding that the accused had committed the actus reus and should not be directed to follow that finding.

In the case *R (on the application of AL) v Secretary of State for the Home Department*[31] the continued detention of a mental health patient following recall and pending review was lawful notwithstanding that he no longer suffered from the condition for which he had originally been detained.

In the case *R v Delroy Lewis-Joseph*[32] fresh medical evidence established that the appellant, who suffered from paranoid schizophrenia, had been unfit to plead at the time of his trial, rendering unsafe his conviction for arson being reckless as to whether life was endangered. Delroy Lewis-Joseph appealed against his conviction for arson being reckless as to whether life was endangered and his lawyers argued that there was now evidence to show that he suffered from paranoid schizophrenia and so he had been unfit to plead at the time of his trial. The English court decided that fresh medical evidence, which satisfied the criteria in the Criminal Appeal Act 1968 s.23(2), established that he had indeed been unfit to plead at the time of his trial. His conviction was quashed and *an order made in its place that he be admitted to a secure unit.* It would also be appropriate to direct that he should be treated as if a restriction order under the Mental Health Act 1983 s.41 had been made.

In the same year 2004, in the case *Stephen Bartram v Southend Magistrates Court*[33], the defendant was found to have committed the *actus reus* of an offence and as a result, *was subject to an order under the Mental Health Act 1983 s.37* but no longer exhibiting the symptoms of a mental disorder, he still could remained subject to the options available under that order where he still suffered from the underlying mental disorder.

In the more recent case in 2007, *ex parte Surat Singh*[34] of alleged insanity at the time of an offence, a magistrates' court had the power to abstain from either convicting or acquitting and instead to make a hospital or guardianship order under the Mental Health Act 1983 s.37 (1), provided that the conditions for making such an order were met. The claimant Singh applied for judicial review of a decision of a district judge to adjourn his trial in a magistrates' court. Singh had been charged with assaulting a police officer in the execution of his duty. Singh pleaded not guilty and it was indicated that the defence of insanity would be advanced. A psychiatric report was served that expressed the opinion that at the time of the incident Singh was labouring under such defect of reason from a disease of the mind as not to know the nature and quality of his act. It was not suggested that Singh was unfit to stand trial.

Conclusion

The analysis, tabulation and examination of the issues arising in the 'insanity' defence illustrates the essence of the English common law system, as it evolves albeit slowly to some firm modern decisions on the 'insanity' defence. However, what is very apparent is the potential misuse of the M'Naghten Rules, now used for all types

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[30] *Ferris v Director of Public Prosecutions,* 7/5/2004

[31] *R (on the application of AL) v Secretary of State for the Home Department*[2004] EWHC 1025 (Admin)

[32] *R v Delroy Lewis-Joseph* [2004] EWCA Crim 1212

[33] *Stephen Bartram v Southend Magistrates Court* [2004] EWHC 2691 (QB)

[34] *(on the application of Surat Singh) v (1) Stratford Magistrates Court (2) Crown Prosecution Service(Interested Party)* [2007] EWHC 1582 (Admin), 3/7/07

of criminal cases ranging from theft, serious fraud, and murder to not very serious assault. The 'insanity' defence has run its course and must be abolished.