THE INSANITY DEFENCE IN CANADA, MALAYSIA AND SINGAPORE: A TALE OF TWO CODES

INTRODUCTION

The Penal Codes in Canada and Malaysia are both based on nineteenth century English criminal law. However, their content and their style of drafting are quite different.[1] But the provisions for the insanity defence in both Codes are very similar, although not identical. This is hardly surprising since the insanity provisions in both Codes are modelled on the famous (and infamous) M'Naghten Rules.[2]

In this article, I will analyse and compare the insanity provisions in both Codes. I will also argue that the insanity provisions in both Codes are outdated, inadequate and in need of substantial reform.

THE INSANITY PROVISIONS

Section 16 of the Canadian Criminal Code sets out the insanity test in the following words:[3]

> 16(1). No person shall be convicted of an offence in respect of an act or omission on his part while he was insane.

[1]The Canadian Criminal Code is based on the English Commissioner's Draft Criminal Code of 1880 which in turn was based on Sir James Fitzjames Stephen's draft Criminal Code of 1879. The Malaysian Penal Code is closely modelled on the Indian Penal Code which was, with some alterations, based on Thomas Babington Macauley's Draft Penal Code for India of 1837. Macauley's Code was better drafted than Stephen's and was also superior in various other respects. For a comparison of the two codes, see R. Cross, "The Making of English Criminal Law", [1978] Crim. L. Rev. 519 and 652.

[2]10 Cl. & F. 200, 8 E.R. 718 (1843).

[3]I have not included section 16(3) dealing with partial insanity since it has fallen into disrepute and disuse in Canada. Section 16(3) was based on the third test in

(2). For the purpose of this section a person is insane when he is in a state of natural imbecility or has disease of the mind to an extent that renders him incapable of appreciating the nature and quality of an act or omission or of knowing that an act or omission is wrong.

Section 84 of the Malaysian Penal Code states:

> **Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.**

SOME PRELIMINARY OBSERVATIONS

The above wording in the two Codes raises a few points of general interest. First, the Malaysian provision, unlike the Canadian provision, does not use the word "insanity". Strictly speaking then, section 84 is not the "insanity defence", but rather the "unsoundness of mind defence." However, in Malaysia, judges, lawyers and commentators usually refer to section 84 as the insanity defence.[4] For the sake of convenience, I will also use that terminology. Interestingly, in Canada, both the Law Reform Commission and the Department of Justice have proposed that the words "mental disorder" be substituted for the word "insane" in the Canadian provision and that the defence be renamed "the mental disorder defence"

M'Naghten which is generally considered redundant to the first two tests. As Cross, Jones & Card state in *Introduction to Criminal Law* (Butterworths: London, 11th ed., 1988) at 154: "A study of the directions made in insanity cases shows that the third test has fallen into desuetude and it can be safely ignored."

[4]See W. Davies, "The Defences of Insanity and Intoxication in Malayan Criminal Law", [1958] Malayan L.J. lxxvi; B. McKillop, "Insanity under the Penal Code" (1966), 7 Mc Judice 65; S. Yeo, "The Application of Common Law Defences to the Penal Code in Singapore and Malaysia", ch. 5 in *The Common Law in Singapore and Malaysia* edited by A.J. Harding (Butterworths, 1985); M. Cheang, "The Insanity Defence in Singapore" (1985), 14 Anglo-American L.R. 245; J. Canagarayar, "The Plea of Insanity: Some Observations on the Application of the 'Wrong or Contrary to Law' Test in Singapore, Malaysia and India" [1985] Malayan L.J. iii; but see K.L. Koh, "Unsoundness of Mind", ch. 12 in *Criminal Law in Singapore and Malaysia* edited by Koh, Clarkson & Morgan (Malayan L.J. Pte Ltd: 1989).

rather than the insanity defence.[5]

Secondly, in the Canadian provision, the insanity defence is expressly extended to both acts and omissions while the Malaysian provision only mentions acts. But this is not a difference in substance because section 32 of the Malaysian Penal Code provides that "in every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions." I would suggest that no contrary intention arises from the context of section 84 and therefore it includes acts and omissions. The reason why section 32 refers to "illegal omissions", rather than simply "omissions", is to incorporate the general principle that there is no criminal liability for an omission unless the accused is under a legal duty to act.

Thirdly, the differences in the opening words of each section illustrate a problem in terminology which will be found in most Anglo-American criminal codes. The terminological question is very fundamental; it relates to the meaning we attribute to the word "offence". For example, if an insane person kills another person, do we say that the insane person *committed the offence of murder* but that he is *excused* from liability for that offence on account of insanity; or do we say that *there is no offence* of murder because the actor was insane. The Canadian Code seems to adopt the first approach although it is not totally consistent in this regard; the Malaysian Code adopts the second approach. The Malaysian Code uses the same standard phrase for virtually all defences: "Nothing is an offence which is done ..." under mistake of fact, or by accident, or by a child, or by reason of unsoundness of mind, or by compulsion, or by exercise of the right of private defence.

A distinction is not made in the Malaysian Penal Code between justifications (which make conduct proper and lawful and not an offence) and excuses (which do not make conduct proper or lawful but which do provide a good reason for

[5]See G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989), 14 Queen's L.J. 135, at 137.

not imposing liability and punishment on the actor).[6] Because the Malaysian Code provides that there is no offence when an insane person kills another, it is necessary to enact special provisions such as sections 98 and 108, which pretend that the insane person's act is an offence of murder, for the purposes of anybody who abets the insane person to commit the killing, or for the purposes of a person who claims the right of private defence against the murderous attack of an insane person.

The Canadian Code attempts to draw a distinction between conduct such as self-defence which is justified and therefore is not an offence and conduct such as that of an insane person which is excused, even though the conduct is itself an offence (i.e. harmful and wrong). Excuses concentrate on circumstances or factors in regard to the actor, not on the lawfulness of the act itself. In this context, the insanity defence operates, of course, as an excuse, not a justification.

ANALYSIS OF THE INSANITY TESTS

Section 84 of the Malaysian Penal Code is identical to section 84 of the Singapore and Indian Penal Codes and therefore in analyzing that section it is appropriate to refer to Singapore and Indian authorities as well.

Although the Malaysian and Canadian provisions on insanity were strongly influenced by the M'Naghten Rules, the provisions are not identical to the M'Naghten Rules. However, there has been an unfortunate tendency in both Canada and Malaysia (as well as Singapore and India) to ignore the precise wording in their own penal provisions and to apply English common law principles and decisions as if they were in all respects identical. Thankfully this tendency has nearly disappeared in Canada in the past 20 years, but it still seems to linger in Malaysia.[7]

[6]For a discussion of the distinction between justifications and excuses, see G. Fletcher, *Rethinking Criminal Law* 759 et seq. (1978); Greenawalt, "The Perplexing Borders of Justification and Excuse", 84 Columbia L. Rev. 1897 (1984).
[7]See Yeo, *supra* n. 4.

In the 1982 Malaysian case of *Tsung Tzee Chang*,[8] the High Court referred to section 84 of their own Code but then proceeded to apply the M'Naghten test. The Court appeared oblivious to the fact that section 84 is not identical to the M'Naghten test.

In the Indian case of *State* v *Chhoteylal Gangadin Gadariya*, the Court held that "the principle underlying [section 84] is substantially based on the well-known M'Naghten Rules, and consequently considerable assistance in understanding its content can be had from the English decisions on the question."[9] And in the case of *Lee Ah Chye* v *PP*, the Malaysian Court of Appeal held that section 84 "is nothing but a translation into simple language of a statement of law given by the judges in England commonly known as the M'Naghten Rules."[10]

A brief historical account of section 84 is instructive. When Macauley drafted the Indian Penal Code in 1837, the M'Naghten Rules were not in existence. Characteristic of his skill as a draftsman, Macauley's provision on insanity was clear, simple and intelligible. Section 67 of the proposed Indian Penal Code of 1837 stated: "Nothing is an offence which is done by a person in consequence of being mad or delirious at the time of doing it."[11] It is a pity that this simple provision, unencumbered by M'Naghten niceties, did not find its way into the final versions of the Indian, Singapore and Malaysian Penal Codes.

After the M'Naghten Rules were promulgated in 1843, the Legislative Council of India enacted Act No IV of 1849. Section 1 of the Act stated: "No person can be acquitted for unsoundness of mind unless it can be proved that, by reason of unsoundness of mind, not willfully caused by himself, he was unconscious and incapable of knowing, in doing the act, that he was doing an act forbidden by the law of the land."[12] If this section was supposed to be modelled on the

[8]Unreported but cited by Koh, *supra* n 4, at 209.
[9]AIR 1959 (MR) 203, at 205.
[10](1963) 29 M.L.J. 347, at 349.
[11]Cited in John D. Mayne, *Criminal Law of India* (4th ed., 1914) at 164.
[12]*Ibid.* at 169-70, cited by Canagarayar, *supra* n 4, at v.

M'Naghten Rules, it was a very poor effort. The M'Naghten Rules provide in part as follows:

> "... 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 his 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."[13]

Section 1 of the 1849 Act did not use the M'Naghten expressions "insanity", "defect of reason" or "disease of the mind" and completely omitted the first limb of the M'Naghten test, "knowing the nature and quality of the act." Section 1 used the terms "unsoundness of mind", "unconscious", "incapable" and "forbidden by the law of the land" which are not used in the M'Naghten Rules. A provision similar to section 1 was also enacted in the Straits Settlement.[14]

Macauley's draft Penal Code for India was subjected to many revisions before it was finally enacted in 1860.[15] Section 84 of the 1860 Indian Penal Code was more similar to the M'Naghten Rules than section 1 of the 1849 Act had been, but it was still different in some important respects. Section 84 provided:

> "Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

Section 84 has remained unchanged since 1860 and is still in force in the Indian, Singapore and Malaysian Penal Codes. Unlike its predecessor (section 1), section 84 adopts both limbs of the M'Naghten test, but it continues to use different language including the expressions "unsoundness of mind", "incapable", "contrary to law" and "nature of the act"

[13]*Supra* n 2.
[14]Canagarayar, *supra* n 4, at v.
[15]See Cross, *supra* n 1, at 519.

rather than "nature and quality of the act". Some of these differences are significant enough to allow an independently-minded court in Malaysia to break away from some of the narrowness of the M'Naghten Rules.

UNSOUNDNESS OF MIND

Proof of "unsoundness of mind" is the first requirement or condition for establishing the insanity defence. It is surprising that there are no Malaysian cases interpreting this important concept. It has been suggested that the term "unsoundness of mind" is broader than the expression "disease of the mind" which appears in the M'Naghten Rules and in the Canadian insanity test.[16] The significance of this distinction has been considerably reduced in recent years because Canadian and English Courts now give a very broad meaning to the expression "disease of the mind." This is due in part to the courts retrieving the concept of "disease of the mind" from the clutches of the medical and psychiatric professions. At one time, courts refused to allow accused persons to rely on the insanity defence if their mental disorder was not classified by the medical profession as a "disease of the mind." But in *Kemp*,[17] *Bratty*[18] and *Sullivan*,[19] the English courts have held that the question of what constitutes a "disease of the mind", for the purposes of the insanity defence, is a legal question, not a medical question. Thus the House of Lords held that the accused's psychomotor epilepsy in *Sullivan* was a "disease of the mind" for the purposes of the insanity defence notwithstanding the expert medical evidence that in medical terms it was not a "disease of the mind" or a mental illness because the disruption of brain functioning during an epileptic seizure was too brief to classify it as a medical disease of the mind.

[16]See Yeo, *supra* n 4, at 162; Cheang, *supra* n 4, at 247; Koh, *supra* n 4, at 212; and Canagarayar, *supra* n 4, at xiii.
[17][1957] 1 Q.B. 399.
[18][1963] A.C. 386 (H.L.).
[19][1983] 2 All E.R. 673 (H.L.).

In *Sullivan*, the House of Lords also held that "mind" is used "in the ordinary sense of the mental faculties of reason, memory and understanding" and that disease of the mind is an impairment of these faculties, whether organic or functional, and whether permanent, transient or intermittent.[20] However, the House of Lords made it clear that disease of the mind for the purposes of the insanity defence does not include temporary malfunctioning of the mind caused by alcohol or drugs, or by "some external physical factor such as a blow on the head causing concussion or the administration of an anaesthetic for therapeutic purposes."[21] The above mental impairments are dealt with by the separate defences of intoxication and non-insane automatism.

In Canada, the situation is similar to the English position. In the case of *Cooper*, the Supreme Court of Canada held that the meaning of "disease of the mind" must be determined as a matter of law by judges, not as a question of scientific categorization by the medical profession.[22] In *Cooper*, the Supreme Court also gave a very broad meaning to the expression "disease of the mind" when the Court stated that it includes "any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion."[23] This broad definition now ensures that a wide range of mental impairments (including personality disorders, psychopathy, and neurosis) are not automatically excluded for consideration under the insanity defence. With a broad definition of disease of the mind, attention can be properly focused on the real issue: What effect did the disease of the mind have on the accused's mental functioning?

When Malaysian courts get around to defining "unsoundness of mind" they would be well advised to ensure that this expression is given a legal, not a medical meaning. Malaysian courts will also have to deal with the difficult problem of

[20] *Ibid.*
[21] *Ibid.*
[22] (1980), 51 C.C.C. (2d) 129 (S.C.C.).
[23] *Ibid.* at 144.

deciding which types of mental malfunctioning should be excluded from the definition of unsoundness of mind for the purposes of the insanity defence under section 84. The first difficulty will be to distinguish between intoxication which results in insanity under section 85(ii)(b) and non-insane intoxication under section 86(ii). The second difficulty will be to determine which causes of mental malfunctioning ought to be classified as non-insane automatism and thereby excluded from the definition of unsoundness of mind under section 84. Although non-insane automatism is not specifically mentioned as a defence in the Malaysian Penal Code, it may be possible to raise it as the defence of accident under section 80 or under the general principle that voluntariness is a legal requirement in the definition of any act or omission.[24]

In *Sinnasamy*, the Malaysian Court of Appeal suggested that if the accused had really stabbed his daughter in a state of unconsciousness caused by an epileptic seizure, then the proper defence would be insanity.[25] Likewise Canadian and English courts classify mental malfunctioning caused by epilepsy as a disease of the mind, not as non-insane automatism.[26] But will Malaysian courts categorize some of the other difficult situations such as somnambulism, hypnotism, concussion from a blow to the head, dissociative state caused by a stressful external event, or hypoglycaemia as "unsoundness of mind" under section 84 or as instances of non-insane automatism?[27] The answer will depend upon the definition that they give to the expression "unsoundness of mind".

INCAPABLE OF KNOWING

In both the Malaysian and the Canadian Penal Codes, the insanity test is expressed in terms of whether the accused, due to unsoundness (or disease) of the mind, is "incapable of knowing" rather than whether the accused *actually* knew.

[24]See Yeo, *supra* n 4, at 147-50.
[25][1956] M.L.J. 36.
[26]*Sullivan*, *supra* n 19; *O'Brien*, [1966] 3 C.C.C. 288 (N.B.S.C. App. Div.).
[27]See Koh, *supra* n 4; *Bratty*, *supra* n 18; *Rabey* (1980), 54 C.C.C. (2d) 1 (S.C.C.); *Quick*, [1973] 3 All E.R. 374; *Bailey*, [1983] 2 All E.R. 503.

The M'Naghten Rules use the latter test. Canadian and Malaysian courts have generally ignored this distinction. However, in the Indian case of *Lakshimi*, the court said:

> "The significant word in the above section is 'incapable'. The fallacy of the above view lies in the fact that it ignores that what s 84 lays down is not that the accused claiming protection under it should not know an act to be right or wrong, but that the accused should be "incapable" of knowing whether the act done by him is right or wrong. The capacity to know a thing is quite different from what a person knows. The former is a potentiality, the latter is the result of it. If a person possesses the former, he cannot be protected in law, whatever might be the result of his potentiality. In other words, what is protected is an inherent or organic capacity, and not a wrong or erroneous belief which might be the result of a perverted potentiality ... What the law protects is the case of a man in whom the guiding light that enables a man to distinguish between right and wrong and between legality and illegality is completely extinguished. Where such light is found to be still flickering, a man cannot be heard to plead that he should be protected because he was misled by his own misguided intuition or by any fancied delusion which had been haunting him and which he mistook to be a reality."[28]

Although the M'Naghten Rules do not use the word "incapacity", a somewhat similar effect may be achieved by the words "defect of reason" which only appear in the M'Naghten Rules, and not in the Malaysian or Canadian provisions on insanity. In the English case of *Clarke*, the Court of Appeal held that the expression "defect of reason" restricts the M'Naghten Rules to persons who are "deprived of the power of reasoning" and therefore the M'Naghten Rules "do not apply and never have applied to those who retain the power of reasoning but who in moments of confusion or absent-mindedness fail to use their powers to the full."[29] In *Clarke*, the accused's defence to a charge of shoplifting was that she took three items from a store without paying for them because of absent-mindedness caused by depression. The Court of Appeal held that this evidence did not raise the insanity defence because, even if true, the accused did not have a defect of reason, she simply failed to exercise her powers of

[28]AIR (1959) 534, 60 Cr.L.J. 1033.
[29][1972] 1 All E.R. 219.

reasoning on that occasion, due in part to her depression. A new trial was ordered, leaving open the possibility that the accused would be acquitted on the basis of no *mens rea* due to mental malfunctioning not constituting insanity.

Concentrating on the distinction between capacity to know and actually knowing is one way for the Canadian and Malaysian courts to introduce a general defence of diminished responsibility under the guise of "no *mens rea* due to mental disorder short of insanity." This has become an increasingly popular practice in Canada.[30] As Colvin notes in his textbook on Canadian Criminal Law: "At one time, it was generally supposed that the only way in which evidence of mental disorder could be used to deny criminal liability was through an insanity defence. In recent years, however, the tendency has been to recognize that, as long as an assertion of mental *incapacity* is avoided, evidence of mental disorder can be used to support a simple denial that a mental element of the offence was present ... It may ... be a possible option where the allegation is that some material circumstance or consequence was not appreciated. The "normal" mind, with full mental capacity, can still make mistakes. The disordered mind may be more likely to make mistakes and yet still retain the capacity to achieve a correct understanding. The special defence of insanity, on the other hand, is geared to extreme cases where the states of mind which are alleged can only be explained on the basis of some breakdown of capacity."[31]

If Malaysian courts begin to recognize this distinction, it must be acknowledged that there will be many cases where a judge or jury will have difficulty deciding whether an accused was incapable of knowing or simply did not know because of a failure to use his or her power or capacity to know. McKillop argues that if an accused actually lacks the requisite knowledge for criminal liability as a result of his or her unsoundness of mind, it would be "splitting verbal hairs" to suggest that he does not also lack the capacity to know.[32]

[30]D. Stuart, *Canadian Criminal Law* (Carswell: Toronto, 2nd ed, 1987), at 346-50.
[31]E. Colvin, *Principles of Criminal Law* (Carswell: Toronto, 1986), at 238.
[32]McKillop, *supra* n 4, at 69.

That will be true in some cases, but not necessarily in all cases.

Limiting the insanity defence to cases where the accused, due to mental disorder, is incapable of knowing rather than simply does not know, would appear to be further narrowing what is already a very restrictive insanity defence. Strangely enough, this particular form of restriction may be advocated by the accused and opposed by the prosecution. If adopted, the accused may succeed in a defence of no *mens rea* due to mental disorder not amounting to an incapacity to know. Such a defence will result in an outright acquittal rather than a special verdict of not guilty by reason of insanity which normally results in the detention of the accused indefinitely.

On the other hand, Canagarayar has argued that relying on the "incapacity to know" test would offer the accused a greater chance of succeeding under the insanity defence than would the test of whether the accused actually knew.[33] He asserts that there are cases where the accused may admit that he knew, but that a court might, despite his admission, conclude that he did not have the *capacity* to know. The error in this argument is the assumption that a court will unquestionably accept the admission of knowledge made by an insane person. It is not logically possible to conceive of a situation where the accused, at one and the same time, actually knew what he was doing, yet lacked the capacity to know what he was doing. Thus an insanity test based on incapacity to know is necessarily narrower than a test based on what the accused actually knows.

KNOW VERSUS APPRECIATE

In section 84 of the Malaysian Penal Code and in the M'Naghten Rules, the word "know" is used; in section 16 of the Canadian Criminal Code the word "appreciate" is used in regard to whether the accused appreciated the nature and quality of his act and the word "know" is used in regard to whether the accused knew that his act was wrong.

[33]Canagarayar, *supra* n 4, at xiv.

The possible distinction between "know" and "appreciate" was largely ignored by Canadian courts for many years. However, in 1956, a Royal Commission concluded that the Canadian insanity test was not in need of reform since, in the Commission's view, the Canadian test was much wider than the M'Naghten test.[34] In particular, the Commission contended that although the word "know" in the M'Naghten Rules restricted the insanity test to a mere cognitive test, the expression "incapable of appreciating" in the Canadian test was much wider and went far beyond the mere cognitive nature of the M'Naghten test.

In 1980, the Supreme Court of Canada seemed to confirm this wider view of "appreciate" in the cases of *Cooper*[35] and *Barnier*.[36] In particular, the Supreme Court held that the words "know" and "appreciate" are not synonymous and that the word "appreciate" was used by the draftsmen of the Code "to make it clear that cognition was not to be the sole criterion."[37] The Court held that appreciate involves an "[e]motional, as well as intellectual awareness of the significance of the conduct."[38] The Court also added that the word "appreciate" "imports an additional requirement to mere knowledge of the physical quality of the act. The requirement, unique to Canada, is that of perception, an ability to perceive the consequences, impact and results of a physical act."[39]

However, in the subsequent cases of *Kjeldsen*[40] and *Abbey*,[41] in which the insanity pleas were both rejected, the Supreme Court of Canada seems to have effectively narrowed, if not completely eliminated this "unique" Canadian requirement.[42]

[34]Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases (Ottawa, Canada, 1956).
[35](1980) 51 C.C.C. (2d) 129 (S.C.C.).
[36](1980) 51 C.C.C. (2d) 193 (S.C.C.).
[37]*Supra* n 35, at 145.
[38]*Ibid.*
[39]*Ibid* at 147.
[40](1981) 24 C.R. (3d) 289 (S.C.C.).
[41](1982) 68 C.C.C. (2d) 394 (S.C.C.).
[42]See Ferguson, "Recent Developments in the Canadian Law of Insanity: Progression, Regression or Repression?" 3 Medicine and Law 287 (Springer-Verlag, 1984).

In both cases, the Supreme Court applied a narrow cognitive test to the requirement that the accused appreciate the nature and quality of his act. In this respect, the Canadian test seems to have reverted back to a narrow M'Naghten test.

NATURE OF THE ACT

Both the Canadian test and the M'Naghten Rules refer to the "nature and quality of the act", whereas the Malaysian Penal Code refers simply to "the nature of the act". It would be better if all provisions referred to the "nature and consequences" of the act, as appears in section 83 of the Malaysian Penal Code dealing with infancy. It is likely, but by no means certain, that both Malaysian and English courts would include knowledge of the consequences of an act as part of the requirement that an accused understand the nature, or the nature and quality, of an act. In Canada, the Supreme Court of Canada has made it clear that "appreciating the nature and quality of an act" also requires that the accused understand the physical consequences which flow from his or her act.[43]

Cheang suggests that "in view of the decision in *Codere* that the word "quality" refers to physical and not moral quality, it seems that the two expressions [nature of the act and nature and quality of the act] are indistinguishable."[44] That may be so, but it seems to me that the lack of reference to "quality of the act" in the Malaysian Code could be used to argue that "nature of the act" refers only to a knowledge of the act itself and not to the physical consequences of that act. I suggest, however, that such a conclusion would be inconsistent with the general principle that both an act and its consequences are essential ingredients of *actus reus* and *mens rea*.

[43]*Cooper, supra*, n 35 and *Kjeldsen, supra* n 40.
[44]Cheang, *supra* n 4, at 249.

WRONG OR CONTRARY TO LAW

The M'Naghten Rules and the Canadian test use the word "wrong" whereas the Malaysian Penal Code uses the expression "wrong or contrary to law". Whether the word "wrong" means morally wrong or legally wrong, or both, has been a matter of considerable dispute in England and other Commonwealth countries. The addition of the words "contrary to law" in the Malaysian Penal Code have only served to further confuse the issue in Malaysia.

The confusion can be traced in part to the use of different expressions in various parts of the M'Naghten Rules. In one place, the Law Lords speak of the accused knowing that "he was acting contrary to law; by which expressions we ... mean the law of the land." But in laying down the insanity test, the Law Lords said the test is whether the accused knew "that he was doing what was wrong". In discussing this test, the Law Lords spoke of the accused's "knowledge of right and wrong in respect of the very act with which he is charged". The Law Lords also stated: "If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable."[45] Certainly the reference to "right and wrong" and "ought not to do" imply that the word "wrong" includes the notion of morally wrong.

In *Windle*, the English Court of Criminal Appeal resolved the dispute as to the meaning of wrong by deciding that wrong means legally wrong, not morally wrong. The Court stated:

> Courts of law can only distinguish between that which is in accordance with the law and that which is contrary to the law ... The law cannot embark on the question and it would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law ... In the opinion of the court there is no doubt that in the M'Naghten Rules 'wrong' means contrary to law and not 'wrong' according to the opinion of one man or of a number of people on the question whether a particular act might not be justified.[46]

[45] *Supra* n 2.
[46] [1952] 2 Q.B. 826, at 833-34.

In the Australian case of *Stapleton*,[47] the High Court considered the meaning of the word "wrong" in the M'Naghten Rules. The High Court refused to follow *Windle*, holding instead that the word "wrong" refers to moral wrongness, rather than legal wrongness. The High Court adopted with approval the following statement by Dixon J. in the Australian case of *Porter*:

> The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong.[48]

Thus the High Court adopted a morally wrong test, not in the sense of the accused's own subjective view of morality, but in the sense of whether or not the accused knows "that his act was wrong according to the ordinary standards adopted by reasonable men."[49]

In the Canadian case of *Schwartz*, the Supreme Court of Canada held, in a five to four split decision, that the word wrong in section 16 of the Canadian Code means legally wrong, not morally wrong (in the sense of being contrary to the ordinary standards of reasonable persons).[50] The Supreme Court expressly adopted the interpretation in *Windle* and rejected the interpretation in *Stapleton*. The dissenting judges, to no avail, pointed out that the "legally wrong" interpretation was contrary to the views of both the Canadian Royal Commission and Sir James Fitzjames Stephen, historically inaccurate, contrary to its common and ordinary meaning, and not followed in Australia, Ireland or the majority of states in the United States.

[47](1952) 86 C.L.R. 358.
[48]*Ibid.* at 367, quoting (1933) 55 C.L.R. 182, at 189-90.
[49]*Ibid.* at 375.
[50](1976), 29 C.C.C. (2d) 1 (S.C.C.).

In Malaysia, section 84 uses the words incapable of knowing "that he is doing what is either wrong or contrary to law." Since the expression "either ... or" is used, it would be logical, and in accordance with ordinary principles of statutory interpretation, to assume that "wrong" means one thing and "contrary to law" means something else. On that assumption, it would be natural to give wrong its ordinary meaning, that is, morally wrong in the sense that the accused has the capacity to know that his act is considered wrong in the eyes of reasonable persons.

There are no Malaysian cases which specifically address this issue.[51] In India, there are cases which go both ways. In *Geron Ali* v *Emperor,* the Calcutta High Court applied what has been called a "conjunctive approach" holding that the accused cannot rely on the insanity defence if he knew that what he was doing was contrary to law but he did not know that it was morally wrong, or vice versa.[52] This case could be explainable on the basis that the Court assumed morally wrong referred to the accused's private ethics, rather than the standards of a reasonable person. On the other hand, the later case of *Ashiruddin Ahmed,* without referring to *Geron Ali,* held that an accused was insane if he was capable of knowing that his act was contrary to law, but not capable of knowing that it was morally wrong.[53]

Canagarayar lists a number of novel arguments which support the conjunctive approach of *Geron Ali.*[54] He concludes that the best view is that the words "or contrary to law" were inserted in section 84 to explain the meaning of the first word "wrong". Thus he argues that the words "wrong" and "contrary to law" mean the same thing, that is, legally wrong. I suggest that this argument ignores the use of the word "either" before the word "wrong". "Either ... or" suggest two meanings, not one. It is true that the word "or" by itself is sometimes used to further describe the first word, but that is not so, when the combined expression "either ...

[51]See Cheang, *supra* n 4, at 253.
[52]A.I.R. 1941 Cal. 129.
[53](1949), 50 Cr.L.J. 255.
[54]Canagarayar *supra* n 4, at ix-xii.

or" is used. In any event, I would also argue that Canagarayar's view is also wrong for the historical and policy grounds which are set out in *Stapleton* and the dissenting judgment in *Schwartz*. McKillop, Cheang and Yeo also seem to favour the latter view.[55] However, there is a real danger that Malaysian courts will once again blindly follow English precedents such as *Windle* and conclude that wrong means legally wrong only, notwithstanding that the words used in section 84 are different from the words used in the M'Naghten Rules.

IRRESISTIBLE IMPULSE

It is arguable that irresistible impulse, (i.e., the accused's inability to control his conduct) arising from a disease of the mind was part of the law of England prior to M'Naghten.[56] But the M'Naghten Rules state the test for insanity solely in terms of cognition (knowledge), without reference to the accused's volitional (conative) capacity or affective capacity (i.e. emotions and feelings). Subsequent to M'Naghten, the English courts have consistently held that a person who knows the nature and quality of his act and that it is wrong cannot rely on the insanity defence even if that person had a disease of the mind at the time of the offence which rendered him incapable of resisting the impulse to commit that crime.[57]

The same approach was adopted in *Sinnasamy* by the Malaysian Court of Appeal which held in obiter that irresistible impulse was not itself a defence.[58] Canagarayar has argued, relying on the Indian case of *Ramdulare* v *State*,[59] that the

[55]McKillop, *supra* n 4; Cheang, *supra* n 4, at 251-54; Yeo, *supra* n 4, at 163-65.
[56]See the discussion of this point in Verdun-Jones, "Evolution of the Defences of Insanity and Automatism" (1979) 14 U.B.C. L. Rev. at 36-42. See also Hawkins, *Pleas of the Crown* at 1 (2nd ed. 1724) where it is said: "The Guilt of offending against any law whatsoever, necessarily supposing a wilful Disobedience can never justly be imputed to those, who are either uncapable of understanding it, or of conforming themselves to it." Cited by Dickson, J. in *Cooper* v *The Queen*, *supra* note 35, at 144. See also "Irresistible Impulse", 5 Malayan L.J. xlix (1936).
[57]See, e.g., *Kopsch* (1925), 19 C.A.R. 50.
[58]*Supra*, n 25.
[59](1959), 60 Cr.L.J. 844.

expression "unsoundness of mind" in section 84 may be viewed more broadly than impairment of cognition alone, and instead should be related to the whole of the accused's personality, including his conative faculties.[60] Although this is a plausible definition for unsoundness of mind, it does not really help since the rest of section 84 restricts the insanity defence to two instances of cognitive impairment: incapacity to know the nature of an act or to know that it is wrong.

In Canada, the Supreme Court also rejected the argument that irresistible impulse was part of the insanity defence in cases such as *Borg*[61] and *Chartrand*[62] notwithstanding that James Fitzjames Stephen and the Canadian Royal Commission were of the view that the word "incapable of appreciating the nature and quality of an act" were broad enough to include true cases of irresistible impulse.

Courts have been reluctant to recognize irresistible impulse as part of the insanity test "on the ground of the difficulty - or impossibility - of distinguishing between an impulse which proves irresistible because of insanity and one which is irresistible because of ordinary motives of greed, jealously or revenge."[63] Such distinctions are difficult to determine, but perhaps they are no more difficult to make than determining whether other states of mind exist such as intention, foresight or knowledge. Certainly these distinctions have been made in some jurisdictions, such as the three Code states of Australia and several states in the United States, where their Codes expressly recognize irresistible impulse or an inability to control one's behaviour or conform to the requirements of the law. And in the three non-Code states of Australia, which are governed by the M'Naghten Rules, the Australian courts have suggested that an accused's irresistible impulse to commit criminal acts may "afford the strongest reason for supposing

[60]Canagarayar, *supra* n 4, at xiii.
[61][1969] S.C.R. 551.
[62][1977] 1 S.C.R. 314.
[63]J.C. Smith and B. Hogan, *Criminal Law* (Butterworths: London, 6th ed. 1988) at 195.

that he is incapable of forming a judgment that they are wrong, and in some cases even of understanding their nature".[64]

DIMINISHED RESPONSIBILITY

In 1957, England introduced a special defence called diminished responsibility.[65] It applied only to the offence of murder, reducing it to manslaughter, and thereby allowing a mentally disordered accused to avoid the mandatory sentence of capital punishment. This provision was adopted into the Singapore Penal Code in 1961 as Exception 7 to section 300.[66] However Malaysia, India and Canada have not adopted this special defence.

Although one can level several criticisms at the defence of diminished responsibility; the defence does at least include cases of irresistible impulse and thereby mitigates the harshness of its exclusion from the insanity defence. Such mitigation is not available in Malaysia, India or Canada. Although the defence in Canada of no *mens rea* due to mental disorder short of insanity is a type of diminished responsibility, it will normally not work for a person who knows what he is doing, but cannot resist it, since that person will have *mens rea*.

BURDEN OF PROOF

In England and Canada, the burden of proving the insanity defence rests on the accused if he or she attempts to raise that defence. The accused must prove the existence of the defence, not beyond a reasonable doubt, but rather on a balance of probabilities (which is the ordinary standard of proof in civil actions). The rule which places the burden of proving the insanity defence on the accused is an historic anomaly in England and Canada. It is an exception to the

[64]*Sodeman* (1936), 55 C.L.R. 192, at 215, approved in *Brown* (1959), 66 A.L.R. 808, at 814, which was not disapproved on appeal to the Privy Council: [1960] A.C. 432, at 449-50.

[65]Section 2, *Homicide Act*, 1957, U.K., c. 11.

[66]Kok, Cheang and Chee, "Diminished Responsibility - The Position in Singapore" (1987), 16 Anglo-American L.R. 268.

general rule which applies to other defences such as automatism, intoxication, provocation, self-defence and duress. In the case of these other defences, once some evidence of their existence is before the court, the prosecutor must prove beyond a reasonable doubt that the offence occurred in the absence of such a defence. In other words, the prosecutor has the burden of disproving the existence of the defence. The insanity defence is the one common law exception. There is no justification in logic or policy for this exception.

In Malaysia, the burden of proving the insanity defence is also on the accused. However, in Malaysia, this burden is not exceptional to the insanity defence alone. Section 105 of the Malaysian Evidence Act states that the burden of proving any of the general exceptions in the Penal Code is on the accused and the court shall presume the absence of such circumstances. These general exceptions appear in Chapter IV of the Penal Code and cover most of the general defences such as accident, infancy, insanity, intoxication, duress, self-defence and defence of property.[67] However, notwithstanding the existence of section 105, the burden of proof in criminal cases in Malaysia is in some respects uncertain and in other respects internally inconsistent.

First I will comment on the burden of proof in England and Canada, and then I will return to the situation in Malaysia. Professor Fletcher, in his seminal book, *Rethinking Criminal Law,* traces historically the allocation of burden of proof in criminal cases. He notes the common law rule, espoused by Foster and Blackstone, that the defence had to prove "circumstances of justification, excuse and alleviation"[68] was designed for cases tried on a special verdict on the facts, not cases of a general verdict on the defendant's guilt.[69] He explains that the shift from the procedure of a special verdict to a general verdict brought out an ambiguity in the burden

[67]See generally, R. Salim, *Evidence in Malaysia and Singapore* (Butterworths: Kuala Lumpur, 1989) ch. 1; Chin, T.Y., Evidence (Singapore Law Series, Butterworths: 1988) ch. 8; Ibrahim, Burden on the Accused in a Criminal Trial, [1988] 2 Malayan L.J. v.

[68]G. Fletcher, *Rethinking Criminal Law* (1978) at 524 citing 4 Blackstone, *Commentaries on the Law of England* 201 (1769).

[69]*Ibid.* at 527.

of proof that remained camouflaged for a long time. Thus, although the procedure had changed, the common law cases continued to require the accused satisfactorily to prove self-defence, duress, insanity and provocation.[70] But this burden of proof was finally looked at afresh by the House of Lords in the famous case of *Woolmington*[71] in 1935. The House of Lords held that the one golden thread throughout the web of English criminal law is the duty of the prosecution to prove the accused's guilty beyond a reasonable doubt, and therefore, the burden of proof for "exculpating" factors such as accident,[72] provocation,[73] and self-defence[74] must clearly remain on the prosecution.

When the burden of proof was placed on the defendant in M'Naghten's case, the judges were treating insanity in the same manner as all other excusing defences at that time. They were creating neither a special not an exceptional rule for insanity. But when the House of Lords, in *Woolmington,* finally reversed the trend of putting the burden of proof on the accused to establish defences, they mistakenly concluded, without any analysis, that M'Naghten's case was a special and exceptional rule and, therefore, the burden of establishing the defence remained upon the accused. That conclusion was wrong and hence the rule for insanity cases is now anomalous.[75]

In Canada, the burden of proof in the M'Naghten Rules was codified in 1892, long before the House of Lord's pronouncements in *Woolmington.* Section 16(4) of the Canadian Criminal Code provides that everyone shall, until the contrary is proved, be presumed to be sane. It is well established by Canadian case law[76] that if the accused raises the insanity defence this section has the effect of putting the burden of proof on a balance of probabilities on the accused. However, there is now a case pending before the Supreme Court of Canada in which it is being argued that the burden of proof

[70] *Ibid.* at 526, nn 40-43.
[71] [1935] A.C. 462 (H.L.).
[72] *Ibid.*
[73] *Mancini,* [1942] A.C. 1.
[74] *Chan Kau,* [1955] A.C.206.
[75] But see G. Williams, *Criminal Law, The General Part* (2nd ed. 1961) at 516-29.
[76] See D. Stuart, *supra* note 30, at 342.

on the accused for the insanity defence is contrary to the presumption of innocence guaranteed in section 11(d) of the Canadian Charter of Rights and Freedoms and therefore of no force and effect.[77]

In Malaysia, section 105 of the Evidence Act was enacted long before *Woolmington* and therefore section 105 embodies the old common law view that the accused had the burden of proving any defences. Since the Privy Council decision in *Jayasena,*[78] the Courts in Malaysia[79] and Singapore[80] have held that section 105 places the legal burden of proof on the accused, rather than simply a burden of adducing some evidence in support of the defence. In the case of *Ikau Anak Mail* v *P.P.*, the Lord President of the Federal Court stated that "The Privy Council in the Ceylonese case of *Jayasena* ... has ruled that the burden of proving accident, provocation and self-defence rested upon the accused and could not be construed in light of a decision in *Woolmington* ... that had changed the English law."[81]

Malaysia is still stuck with a codified version of the old common law rule which was overruled in England in 1935 by the House of Lords in *Woolmington*. The common law rule is wrong and so therefore is section 105. They are both a derogation from the presumption of innocence and the basic principle that the prosecution must prove the accused's guilt beyond a reasonable doubt.

With defences which negate the very existence of the *actus reus* or *mens rea* of an offence, there is an inherent inconsistency between the rule that the prosecution must prove *actus reus* and *mens rea* beyond a reasonable doubt and the rule that the accused must prove defences or exceptions. There is no conflict in regard to defences like self-defence and duress which operate as a justification or excuse notwithstanding the fact that the *actus reus* and *mens rea* have been proven.

[77] *Swain*, on appeal from (1986), 53 O.R. (2d) 609. This argument was rejected by the Manitoba Court of Appeal in the earlier cases of *Godfrey* (1984), 11 C.C.C. (3d) 233, and *R.M.C.* (1988), 53 Man. R. (2d) 297.
[78] [1970] 1 All E.R. 219 (P.C.).
[79] [1973] 2 M.L.J. 153 (Fed. Ct.).
[80] [1976] 2 M.L.J. 49 (Ct. App., Singapore).
[81] *Supra* n 78.

But defences such as accident, mistake, automatism, intoxication and insanity operate as a negation of *actus reus* or *mens rea*. To put the burden of proof on an accused for these defences relieves the prosecution, at least in that one respect, of the burden of proving the *actus reus* and *mens rea* beyond a reasonable doubt.

Is there any special reason for placing the burden of proving the insanity defence on the accused? Rupert Cross has forcefully argued that the insanity burden is not only anomalous, but without justification as well.[82] It requires a judge or jury to convict the accused although they have a reasonable doubt (indeed, even a 50-50 doubt) that the accused is not guilty by reason of insanity. Cross argues that the effect of this rule is to create a presumption of guilt and that there must be something very sinister afoot before any legislature can be justified in doing that.

Pragmatic considerations are often raised as a justification for this exceptional burden:

(i) to reduce the likelihood of successful fabrication of the insanity defence;
(ii) a reasonable doubt about the accused's sanity can be too easily created.

Upon closer examination, these pragmatic considerations lack validity. The experience in the United States is particularly revealing. As of 1982, in half the States, and all federal courts, once there is some evidence of insanity, the prosecution has the burden of proving the accused's sanity beyond a reasonable doubt. Does that burden allow a throng of fabricated insanity pleas to succeed? Does it put an intolerable or impossible burden on the Crown? I sampled the reported cases in those jurisdictions for the year 1982. In almost all the cases there was at least some expert evidence supporting the accused's insanity plea. But in twenty-eight of the thirty cases, the defence of insanity failed. The Crown proved its case; the accused failed to raise a reasonable doubt. If anything, these figures suggest that even raising a reasonable doubt about insanity may be too hard a standard to meet,

[82]R. Cross, "The Golden Thread of English Criminal Law", 1976 Rede Lecture.

not too easy. Incidentally, in jurisdictions where the accused had the burden of proof on a balance of probabilities, the accused's insanity plea failed sixteen times in seventeen cases.

DISPOSITION

In Malaysia and Canada the most draconian aspect of the insanity defence is the provisions dealing with the disposition of a person found to be insane. If the insanity defence is proven, the accused does not obtain an ordinary acquittal as in the case of other general defences. Instead a special verdict is rendered. In Malaysia, it is not guilty by reason of unsoundness of mind pursuant to section 347 of the Penal Code; in Canada, it is not guilty on account of insanity pursuant to section 542 of the Criminal Code. Section 348 of the Malaysian Penal Code and section 542 of the Canadian Criminal Code state that the court shall order that the insane acquittee be held in strict or safe custody at the pleasure of the Lieutenant Governor or the Ruler of the State. The court has no choice and no discretion unless the offence is a minor one (summary conviction offence in Canada or an offence tried in Magistrate Court in Malaysia). The Lieutenant Governor or Ruler of the State may order that the insane acquittee be confined in a mental hospital indefinitely. There is no legal right of review or appeal. The insane acquittee may be detained for life. Because an insanity verdict results in an indefinite and potentially life-long order of detention, many accused persons are reluctant to raise the defence except in the most serious of offences. Although I am unaware of it having yet occurred in Malaysia, there is a disturbing trend in Canada whereby the prosecution raise and prove the insanity defence, against the accused's wishes,[83] and thereby succeed in having the accused indefinitely detained.

In Canada, the Department of Justice has recommended a number of reforms which have not yet been enacted.[84] In

[83]See, e.g., *Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.); *Saxell* (1980), 59 C.C.C. (2d) 176 (Ont. C.A.); *Dickie* (1982), 67 C.C.C. (2d) 218 (Ont. C.A.).
[84]See Ferguson, *supra* n 5, at 149-50.

particular, it has been recommended that the Lieutenant-Governor's role be abolished and the final decision-making authority in regard to the disposition of insane persons be placed in a Board of Review. The Board would be mandated to apply the least intrusive or restrictive disposition possible, keeping in mind the interests of the accused and the protection of society. The legislative proposals also set out procedural guidelines for the board of review and the board's decision would be subject to judicial review. The insane accused would no longer be subject to indefinite confinement. Apart from murder, where detention may be for life, there would be an outer limit on the length of detention — ten years for certain serious offences against a person and two years for all other offences. If a mentally disordered offender is still dangerous at the end of that period, an application would have to be made under the provincial mental health legislation to have the person civilly committed. The legislative proposals also provide for a new sentencing option referred to as a hospital order, to deal with persons who are not found insane but who are in need of hospital treatment for their mental disorder.

CONCLUSION

The existing provisions for the insanity defence, and their judicial interpretation in Malaysia and Canada, reveal a narrow and inadequate insanity defence. A number of reforms are required.

1. The insanity tests in both countries are confined to impairment of cognition or understanding alone. They need to be expanded to include volitional and affective impairments as well.

2. Judicial interpretation of the insanity tests have placed too narrow a meaning on the requirement that the accused know (appreciate) the nature (and quality) of his or her act and thus this aspect of the insanity test should be expanded.

3. Judicial interpretation of the insanity tests have been unclear on whether the insanity test requires mental disorder. resulting in incapacity to know or whether actual lack of knowledge without proof of incapacity will suffice. In my opinion the latter should be sufficient.

4. The judicial interpretation of wrong as only meaning legally wrong is too narrow. The insanity defence should extend to persons who do not know, due to mental disorder, that their conduct is either legally wrong or morally wrong.

5. The borderline between insanity and non-insane automatism needs to be clarified. This should be done by distinguishing between these two states of mind in the definition of "unsoundness of mind" or "disease of the mind".

6. To the extent that the insanity defence remains stringent and narrow, a general defence of diminished responsibility should be introduced.

7. Irresistible impulse should be dealt with in the insanity test as an aspect of volitional impairment as it is in the Australian Codes and the Model Penal Code.

8. The burden of proof in insanity cases should be on the prosecution once the issue has been raised by the accused. The prosecution should not be permitted to impose the insanity defence on an accused against the accused's wishes. An accused who is fit to be tried should also be considered fit to decide whether or not to raise the insanity defence.

9. The current system of indefinite confinement of insane acquittees without legal safeguards and rights of review and appeal must be abolished and replaced with a modern legal system which balances and protects the interests of both the insane acquittee and society.

One measure of a society's civility is the manner in which it treats its weakest members such as the young, the infirm and the insane. Based on the law's current treatment of the insanity defence in Canada and Malaysia, we have no reason to be particularly proud. Reform is long overdue.

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