

Scots Law Commission Proposals 2003

Our general approach

1. We are of the view that the law relating to insanity in the criminal law is in many ways unsatisfactory and at the least it requires to be re-stated in order to reflect contemporary legal, medical, and social ideas and beliefs. Insanity is a term used in two different contexts in the criminal law.

Insanity as a defence

1. We take the view that the law of insanity as a defence to a criminal charge needs to be brought up to date to reflect the language and concepts of the 21st Century. Indeed we think that the word 'insanity' itself should no longer be used in the criminal law, and we suggest instead a 'defence of mental disorder.'
2. But it is not just the name but the substance of the defence that calls for reform. At present Scots law uses a test which derives from a book written in 1797 (Hume's Commentaries) and uses out-of-date language ('absolute alienation of reason') which causes problems for people, such as psychiatric experts and jurors, who have to apply the test. We believe that the test would be easier to apply if it simply referred to the existence of a mental disorder suffered by the accused. In our view a person should be excused from criminal liability if the presence of a mental disorder meant that he or she did not fully or rationally understand his or her conduct at the time of the offence. For this reason we propose that the defence should be defined in terms of the accused's failure to appreciate his or her conduct.
3. In some legal systems the 'insanity' defence includes failures by the accused to control his or her behaviour as a result of mental disorder (a so-called volitional element of the defence). We are undecided whether Scots law should include any volitional element in the new mental disorder defence. The proposed test of appreciation of conduct, if understood in a wide sense, should cover all cases where a person's mental disorder should excuse his or her criminal acts. However we have not reached a concluded view on this particular issue.

In summary our proposals on 'insanity' as a defence are as follows:

- The defence should be known as 'mental disorder.' Where it is successfully raised, the accused would receive a verdict of 'not guilty by reason of mental disorder.'
- The defence should require the presence of a mental disorder suffered by the accused at the time of the alleged offence. The term 'mental disorder' should not be defined in statute. The existence (or non-existence) of a mental disorder in a particular case would be a matter for expert, psychiatric evidence.
- The core element of the defence is that by reason of a mental disorder at the relevant time the accused was unable to appreciate the nature of the conduct forming the basis of the charge.
- Rather than make a positive proposal, we ask the question whether the definition of the defence should contain any reference to the accused's volitional incapacities or disabilities.

September 19, 2009

Sleepwalking: You wouldn't credit what you can do while you're meant to be at rest

This condition is increasingly being used as a defence in court. So what are we really capable of doing as we slumber



Simon Crompton

In September last year Donna Sheppard-Saunders, a 33-year-old from West Sussex, held a pillow over her sleeping mother's face for 30 seconds before stopping as her mother struggled and called out for help. In June she was acquitted of attempted murder because the court accepted that she was sleepwalking and was thus unaware of her actions.

This is not an isolated case. The British courts are faced with an upsurge of "I did it in my sleep" defences for crimes from dangerous driving to murder. The problem that this presents for lawyers and sleep experts is the subject of a conference this week at the Royal Society of Medicine.

To the outsider, such cases prompt scepticism. But the sleep specialists who provide expert testimony at these cases know that many people are capable of carrying out very uncharacteristic actions while asleep as a result of sleep disorders. Between 2 per cent and 4 per cent of adults sleepwalk, and there is plenty of evidence that strange somnambulistic actions such as walking through hotels naked and urinating in cupboards are extremely common. Does that mean, then, that many of us are capable of committing crimes in our sleep?

Sleepwalking is caused by a "wiring error" in the brain. If a sleeping person is disturbed, the primitive, instinctive parts of the brain spring into life but the conscious controlling part does not. It's more likely to happen if we have a family history of sleepwalking, or are tired or stressed or have been drinking.

Dr Chris Idzikowski, Director of the Edinburgh Sleep Centre, who will be chairing the Royal Society of Medicine conference, has given evidence in about 30 court cases involving sleepwalking. "I do think it is being used more often as a defence, possibly because the media has made people more aware of it," he says. "For some people there's no doubt it's a concoction, but for others there's enough in the patterns of behaviour, and past history of sleepwalking, to suggest there's something there."

The reason for the upsurge could partly be because of a quirk in English law. The barrister William Wilson, Professor of Criminal Law at the University of London and a speaker at the conference, says that in English law only people who have made a conscious decision to commit a crime can be punished for it. Sleepwalking, therefore, makes a good defence, particularly since it is hard to disprove. A person who has convinced a court that he or she committed a crime while sleepwalking may, under English law, be found "not guilty by reason of insanity" (even though this has nothing to do with the medical idea of insanity). Until recently, this almost inevitably resulted in being detained in a psychiatric institution.

New legislation, however, has meant that someone the court finds “insane” is much less likely to be detained. “It’s an incredibly difficult area for the law,” Wilson says.

To try to clarify this grey area, an American professor, Michel Cramer-Borneman, has developed the first sleep-forensics unit, at the Minnesota Regional Sleep Disorders Centre, as an expert resource for the legal profession. Having reviewed all legal cases in the UK and the United States involving sleepwalking, he has come to the conclusion that the majority (unlike the cases cited in this article) are “bogus”.

He says that the genuine cases of people committing violence while sleepwalking are exceedingly rare, but people behaving sexually in their sleep — or sexsomnia, as it is known — is quite common. And all of us have the capacity to do something out of character while asleep, he believes. “Sleep disorders are part of the human condition,” he says. “Their peak prevalence is in childhood, when they are quite benign, and after that they diminish because, as the brain develops, so do the neuronal networks that repress these kinds of behaviours.”

So, should we be worried about the harm that we or those close to us might do while asleep? Not according to the consultant neurophysiologist and sleep researcher Dr Peter Fenwick, who believes the greatest risk of harm is to sleepwalkers themselves. He, unlike Professor Cramer-Borneman, insists that sleepwalking occurs only if you have a genetic susceptibility. “Sleepwalkers do kill themselves by walking out of windows, and I get many of these cases referred to me by the coroner,” he says.

There are three rules, he says, if you or a member of your family sleepwalk: one, lock the windows; two, lock the door; three, don’t sleep in the nude.

Curious case of...

Ken Parks, acquitted in Canada in 1987 of bludgeoning his mother-in-law to death with a tyre lever, and attempting to murder his father-in-law, having driven 15 miles to their home. He had a history of sleepwalking and said that his actions took place after he nodded off in front of the television.

James Bilton, 22, from York, cleared in 1985 of raping a woman in his flat, having said that he suffered from sleepwalking since age 13. A German teenager, 17, who stepped out of a fourth-storey window and fell 10m to the ground, where he continued to sleep until he was awoken by police despite suffering a broken arm and leg. He had not been drinking or taking drugs.

October 26, 2004

When sleeping is illegal but sleepingwalking is not

THE contours of the criminal law need to match most people's ideas of right and wrong. In recent weeks, both in Britain and France, the boundaries of what amounts to a crime have come under heated courtroom debate.

In one case a "sleepwalking" man who crashed his car into a wall was acquitted of drunken driving, and in the other a drunk man found asleep in his van had his conviction for being "in charge of a vehicle while unfit" confirmed.

William Bough, 48, a Gulf War veteran, was three and a half times over the legal limit but magistrates acquitted him after hearing evidence from a clinical psychologist that he had been sleepwalking. Bough, of Garstang, near Preston, told West Allerdale and Keswick Magistrates' Court that he had no memory of getting into his car or of the crash, in which he hit a wall at Lillyhall, Workington. The expert evidence, including a 17-page report on Bough's condition, convinced the bench that the defendant was suffering from somnambulism and was probably "sleepwalking" at the wheel when the accident happened last year. The case was dismissed after a five-hour trial.

The court was told that Bough had been suffering from post-traumatic stress disorder since the Gulf War. He had been staying with his mother so that he could accompany her when she was admitted to hospital the following day. He admitted to having had "a few drinks". After the crash, he was found dressed in a T-shirt that he normally wore in bed. He had also left his driving glasses in his overnight bag.

The law offers a defence of automatism to defendants who can show that their behaviour was involuntary. Somnambulism is a form of automatism, in which behaviour does not flow from conscious decisions or will. It has been clearly recognised by the courts as a defence since 1961. The somnambulism defence is, though, not always without consequence for the defendant. In 1991, at Bristol Crown Court, Barry Burgess was sent to a secure hospital after being found "not guilty by reason of insanity" of having brutally attacked a woman neighbour while sleepwalking. This unusual verdict reflected the fact that his somnambulism had not been triggered by an external event but had developed in him organically. In 2002 the Court of Appeal confirmed that if external factors (such as the taking of prescription drugs and drink) operate on an underlying condition that would not otherwise produce a state of automatism then the defence is possible and should go to a jury.

A different principle arose in the case of Peter Sheldrake, of Hatfield Peverel, Essex, who was found asleep in his van in a car park in 2001. He claimed that he had made attempts to arrange alternative transport home but was convicted at Colchester Magistrates' Court of being in charge of the vehicle while unfit, and given 160 hours of community service. Sheldrake failed to convince the magistrates that he had not intended to drive the vehicle, and later complained that he should not have to prove his innocence.

Upholding the conviction, the House of Lords has ruled this month that the charge under the 1988 Road Traffic Act did not infringe the right to a fair trial provided for in Article 6(2) of the European Convention on Human Rights. There was in the charge no irrebuttable presumption of guilt, and defendants were given a reasonable scope to exonerate themselves. Lord Bingham of Cornhill ruled that the offence of being "in charge while unfit" did not require proof from the prosecution of an "intention to drive". There were, he noted, many instances of legislation in which "Parliament has clearly intended to attach criminal consequences to proof of defined facts, irrespective of an individual's state of mind".

Strasbourg jurisprudence has also condoned such laws. In a 1988 decision it was noted that the contracting states could "penalise a simple or objective fact, as such, irrespective of whether it results from criminal intent or from negligence". Lord Bingham explained that in cases such as those of "being in charge of a vehicle while unfit", the task of the court was to "assess whether a burden enacted by Parliament unjustifiably infringes the presumption of innocence". In this case, bearing in mind the seriousness of the wrong to be controlled, and the opportunity of the defendant to rebut the charge (by showing that there was no likelihood of his driving while drunk), the Act was proportionate to the mischief to be addressed. Lord Bingham noted that a person in charge of a car when unfit would be expected to hand the keys to someone else or stay well away from his vehicle.

In 1935, in his entertaining *Misleading Cases*, A.P. Herbert wrote that “there is no juridical distinction between firearms, wild beasts, and motor cars where the safety and peace of the King’s subjects on the King’s highway are concerned”. Indeed, the elegance and logic of much legal reasoning are no more obvious to all at first sight than is the science of computer programming, but they can usually be discovered with study.

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Our Law Commission, on the breadth of the review currently underway 2008

Unfitness to Plead and the Insanity Defence

Background

Given the vulnerability of the mentally ill and the increasing frequency with which they are coming into contact with the criminal justice system, modern criminal law should be informed by modern science, and in particular by modern psychiatric thinking.

The problems with the existing law are many and serious. The current test for determining fitness to plead dates from 1836 and the current rules for determining legal insanity date from 1842. In those days, the science of psychiatry was in its infancy.

The application of these antiquated rules is becoming increasingly difficult and artificial. For example, the key concept of "disease of the mind" has no agreed psychiatric meaning. As interpreted by the courts, it has even come to include conditions that are not mental disorders, such as epilepsy and diabetes. The stringent test of capacity for the purposes of fitness to plead also needs to be reconsidered and should be contrasted with the much wider test contained in the Mental Capacity Act 2005.

Other important questions to be answered include: what is the exact scope of a trial of the facts following a finding of unfitness to plead? What issues can be raised by the defendant, in particular "defences" of accident, mistake and self-defence? What are the relationships between insanity, automatism and diminished responsibility?

The project will draw on relevant empirical evidence and comparative jurisdictions in an attempt to identify better and more up to date legal tests and rules for determining fitness to plead and legal insanity.

Evaluation of Defences



Insanity and Automatism

There are a number of points to consider about the defences:

The shift of the Burden of Proof

There is a different standard of proof depending on whether the defence or the prosecution raise the defence of insanity.

The prosecution must prove beyond reasonable doubt, the defence on the balance of probabilities. This is likely to confuse a jury. It conflicts with the decision of **Woolmington v DPP (1935)** which states that the burden is on the prosecution to prove the **offence** not the **defence**.

The defendant has to prove that he is insane. This places the burden of proof on him. It is possible that this is in breach of Article 6 of the European Convention on Human Rights which states that the defendant is innocent until proven guilty.

The definition of Insanity

The definition has been said to be 'medically irrelevant'. The legal definition has not changed significantly since 1843. In 1953 evidence given to the Royal Commission stated that the definition was obsolete and misleading.

People suffering from certain mental disorders do not come within the defence e.g. those suffering from irresistible impulses and psychopaths such as **Byrne**. They do not come within the M'Naghten rules as they know what they are doing and that it is wrong. However they cannot prevent themselves from acting and have a recognised medical disorder.

On the other hand, those suffering from physical illnesses such as diabetes (**Hennessy**), heart disease (**Kemp**) and sleep walkers (**Burgess**) are legally insane. Additionally in diabetes cases sometimes diabetics are classed as insane and other times not. Taking too much insulin is classed as automatism (**Quick**) but not taking insulin is insanity (**Sullivan**). This means that the law makes no difference between people who are a danger to society and those who suffer from illnesses such as diabetes and epilepsy which can be controlled by medication.

Social Stigma

The word insanity carries a social stigma. It is bad enough to use it in relation to people suffering mental disorders but is completely inappropriate to apply it those suffering from diseases such as epilepsy or diabetes.

The ineffectiveness of the verdict

If a person is found not guilty by reason of insanity then the recommendation could be an indefinite place in a secure hospital. In contrast, a conviction for murder or manslaughter would result in a life sentence that would be unlikely to mean life. Most defendants would probably prefer the conviction and sentence. It would appear that many defendants with mental problems do not raise the defence.

Article 5 of the European Convention on Human Rights says that a person of unsound mind may only be detained where proper account is taken of objective medical evidence. There is likely to be a human rights challenge on indeterminate sentences.

The scope of the defence

The Butler Committee recommended that proof of severe mental disorder should be sufficient to negate responsibility. This would create a presumption of no criminal responsibility where there is proof of a severe mental disorder. This assumes a lack of criminal responsibility simply because of a mental dysfunction.

Insanity overlaps with automatism. It is necessary to decide whether the defendant's automatic state is due to a mental illness or due to external factors. Anyone suffering from any kind of illness which puts them in an automatic state amounts to insanity. This has serious consequences as anyone who is able to use automatism has a complete defence and will be acquitted. If a person is found not guilty by reason of insanity the judge has to impose some kind of order on the defendant.

Decision in Windle

Following the decision in **Windle** a defendant who is suffering from a serious recognised mental illness and who does not know that his act is morally wrong cannot have a defence of insanity when he knows that his act is legally wrong. An Australian case refused to follow this decision. In **Johnson (2007)** the Court of Appeal thought that the Australian case had some merit but recognised that they were obliged to follow Windle.