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# The Insanity Defence: An Argument for Abolition

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## Abstract

This article takes an abolitionist position towards insane automatism (or 'the insanity defence'). With particular reference to Arlie Loughnan's concept of 'manifest madness', it argues that mentally ill defendants are poorly served not only by the insanity defence as currently formulated, but by any defence which focuses on their status as 'mentally ill' rather than the specific excusatory elements of that illness. It contends, however, that advocates for abolition should not assume that existing criminal defences are currently primed to account for those elements. What is required is a thoroughgoing reform of all criminal defences, with mentally ill and/or disordered defendants in mind, to which abolition of the insanity defence must be secondary.

## Keywords

Insanity defence, insane automatism, mental illness, M'Naghten

## Introduction

That the insanity defence is currently unfit for purpose is as uncontroversial an opinion as one is likely to find in legal academia. There is, however, a great deal of debate regarding how to proceed. Two broad schools of thought can be identified: those who feel that the defence should be retained, but reformed,[1] and those who feel that the defence should be abolished altogether, leaving mentally ill defendants to rely on general common law principles to excuse them from liability.

In this paper I will advocate for the abolitionists. I will argue that they are correct in thinking that excusatory elements of mental illness could and should be accounted for within the defences and principles used for mentally well defendants, rather than by a separate 'insanity' defence. I will contend, however, that in order for this to be achieved a thoroughgoing programme of reform is required to actively make space for mentally ill defendants within the defences we currently have. I will use the

1. This was the position taken by the Law Commission in its recent discussion paper: Law Commission, *Criminal Liability: Insanity and Automatism*, Discussion Paper (2013).

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defence of general duress as a case study to show how this could be done. I will conclude that it is insufficient and irresponsible to advocate for abolition without also advocating for more comprehensive reform of this or similar kind; but that ultimately, abolition coupled with such reform is the only way in which mentally ill defendants can be fairly served by their criminal justice system.

## The Law: Insane Automatism

The insanity defence in English law can be traced back to the case of Daniel M'Naghten in 1843, whose controversial acquittal for murder led to extensive debate in the legislative chamber of the House of Lords. The outcome of this debate was the formulation of the *M'Naghten* rules on the liability of 'insane' defendants, which remain in effect to this day:[2]

> . . . every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to [the jury's] satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know what he was doing was wrong.[3]

The principles underlying a defence of 'insanity' laid out in this passage may be summarised as follows:

1. It is for the defence to prove that;
2. Because of a defect of reason stemming from a disease of the mind, the defendant;

    a. Did not know the nature and quality of his act, or;
    b. Did not know that his act was wrong.

These principles remain more or less unchanged, although clarified and supplemented by case law and by statute. It was held in *Clarke*[4] that 'defect of reason' requires an actual impairment of rationality, rather than a single, or even a habitual, failure to be reasonable. A 'disease of the mind' was in *Kemp*[5] and in *Bratty*[6] confirmed as distinct from a disease of the brain; though the latter may give rise to the former, proof of its presence is not a requirement of the defence. As for the 'two limbs' of the defence, the 'nature and quality' limb was clarified in *Codere*[7] as requiring the defendant to have been ignorant of the physical nature of his act, as opposed to its status morally or legally. This is the realm of the second limb, with *Windle*[8] and *Johnson*[9] establishing that in order to defeat a defence of insane automatism, it is sufficient for the prosecution to demonstrate that defendant knew his actions to be illegal, whether or not he felt them to be morally correct. If knowledge of illegality cannot be proven, however, showing that the defendant knew his actions to be immoral 'according to the ordinary standard adopted by reasonable men' will also defeat an insanity plea.[10]

2. Formally confirmed as binding law in *Sullivan* [1984] AC 156.
3. *M'Naghten's case* [1843] UKHL J16 (19 June 1843) at 210.
4. *R v Clarke* [1972] 1 All ER 219.
5. *R v Kemp* [1957] 1 QB 399.
6. *Bratty v A-G for Northern Ireland* [1963] AC 386.
7 *R v Codere* [1916] 12 Cr App R 21.
8. *R v Windle* [1952] 2 QB 826.
9. *R v Johnson* [2007] EWCA Crim 1978.
10. *Codere*, above n. 7.

The dangers of relying on a concept of mental dysfunction developed in 1843 should be obvious. The very term 'insanity' is hopelessly outdated and offensive, and the defence has consistently been applied in a manner troublingly unconnected to medical or psychiatric reality; epileptics,[11] diabetics,[12] sleep-walkers[13] and sufferers of pre-menstrual syndrome[14] have all been deemed 'insane' according to its remit, while those suffering from compulsions or irresistible impulses are excluded and left without legal recourse. Furthermore, reliance on the distinction between 'external' and 'internal' causes to differentiate between 'sane' and 'insane' automatism has delivered illogical and inconsistent results.[15] Something must be done: but what?

## The Case for Abolition

To begin with, a distinction is necessary. When we speak of 'abolition' and of 'abolitionists' we are not referring to the position that the mental health of defendants should under no circumstances bear upon their liability.[16] Though this position does have its proponents, they are blessedly few in number and it is not the object of this paper to engage with them. We are concerned with 'partial' abolition, the idea that where mental illness or disorder excuses its sufferers from liability, this can be analysed according to the same principles that apply to mentally healthy defendants—*mens rea*, intent, knowledge and so forth.[17] A separate 'insanity' defence is therefore unnecessary.

Consider the first limb of *M'Naghten*. If the defendant was unaware of the physical nature of his act—i.e. if *he did not know what he was doing*—then he cannot have had the necessary *mens rea* for the offence in question (for offences requiring *mens rea*). If this is so, then the prosecution will be unable to prove all of the elements of the offence, which under normal circumstances would be sufficient to absolve a defendant of liability. By requiring him to plead insanity[18] according to *M'Naghten* rather allowing him to rely on the absence of *mens rea*, the mentally ill defendant is saddled with an additional burden.

And this is not all the defendant is saddled with. The 'Special Verdict' ('not guilty by reason of insanity') carries a considerable degree of stigma. R.D. Mackay's research has indicated that defendants who could potentially plead insanity would often prefer to plead guilty and risk incarceration, rather than face the stigma of having been found to be 'criminally insane'.[19] A striking case is *Hennessy*[20] in which the diabetic defendant, having been acquitted on grounds of insanity, changed his plea to guilty and appealed against the verdict, preferring to be convicted as a criminal than labelled 'insane'.[21]

Of course, at the time of *Hennessy* a 'Special Verdict' brought with it inevitable consequences of disposal—a defendant found 'not guilty by reason of insanity' was subject to compulsory committal to a psychiatric institution. Happily this is no longer the case, since the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 has introduced a wider variety of disposal options, including community-based disposals.[22] The Domestic Violence, Crime and Victims Act 2004 then consolidated

11. *Bratty*, above n. 6.
12. *Hennessy* [1989] 1 WLR 287.
13. *Burgess* [1991] 2 WLR 1206.
14. *Smith (Sandie)* [1982] Crim LR 531.
15. For example: current case law dictates that a defendant whose act was carried out whilst he was in a diabetic coma will *either* be eligible for the a 'special verdict' *or* acquitted on grounds of sane automatism, depending on whether the coma was hyper- or hypoglycaemic, respectively (see *Hennessy*, above n. 12, and *Quick* [1973] 3 WLR 26).
16. M. Hathaway, 'The Moral Significance of the Insanity Defence' (2009) 73(4) *Journal of Criminal Law* 310–17.
17. N. Morris, 'The Criminal Responsibility of the Mentally Ill' (1982) 33(2) *Syracuse Law Review* 477–531.
18. *Roach* [2001] EWCA Crim 2698 confirmed that it is for the judge to determine whether an insanity plea has been raised.
19. R.D. Mackay, 'Fact and Fiction about the Insanity Defence' [1990] Crim LR 247–55.
20. Above n. 12.
21. See also *Sullivan*, above n. 2.
22. Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, ch. 84, s. 5 (1–3).

those options and brought the criminal law in line with the Mental Health Act 1983,[23] requiring that a hospital order could only be made on the basis of medical evidence identifying a mental disorder requiring specialist treatment.[24] Even with the potentially disastrous consequence of a compulsory hospital order removed, however, stigma surrounding insane automatism lingers, and despite a notable increase in 'Special Verdicts' following the 1991 and 2004 Acts[25] it remains a very infrequently pleaded defence.[26]

## The Case for Abolition Extended: 'Manifest Madness' and the Stigma of Insanity

The abolitionists' argument is certainly compelling. The existence of a separate insanity defence appears to be an outdated throwback to a time when our understanding and awareness of mental illness was restricted to the surface level. Arlie Loughnan has spoken of the concept of 'manifest madness', which, she argues, is still prevalent within legal treatment of mental illness. Loughnan's position is that despite increasing reliance upon expert medical evidence, there remains a tendency within criminal law to regard 'madness' as something that will make itself known in a way that is clear and recognisable to the lay person.[27] This manner of thinking comes out in the comment of M.S. Moore, quoted with approval in the Law Commission's recent discussion paper: 'Crazy people are not responsible because they are crazy, not because they always lack intentions, are ignorant, or are compelled'.[28] Moore appears to be making what is known within philosophy as a 'category mistake'; the mistake of regarding something which is merely the sum of its parts as existing above and beyond those parts.[29] Like the confused student who sees the library, dormitories and lecture halls, and asks: 'But where is the university?', Moore sees the compulsions, the lack of rationality and the cognitive limitations and asks: 'But where is the madness?'

I believe it is this kind of thinking which leads to the belief that a separate defence of insanity must be retained. The idea, as Loughnan identifies, is that individuals suffering from mental illness do not differ from the mentally healthy merely by degree, but in kind.[30] A mentally ill defendant lacking *mens rea* is regarded as qualitatively unlike a mentally healthy defendant lacking *mens rea*. An obsessive compulsive performing a ritual is regarded as qualitatively and fundamentally unlike a mentally well individual responding to pressure that is produced by an external source rather than their own mind. It is this 'othering' of mental illness and the mentally ill which underlies the belief that mentally ill defendants must be afforded a distinct and separate defence which focuses on their status as 'mentally ill', rather than on the particular limitations, thought processes and behavioural patterns which are the sum of that status. Equipped as we now are to understand those thought processes and behavioural patterns, the retention of a separate 'insanity' defence seems inappropriate.

Furthermore, retaining a defence of 'insanity' in any form carries implications for public perception of the mentally ill. We have seen how the defence forces defendants to choose to either accept criminal liability, or to make a plea which opens them up to social stigma. Additionally, the very existence of the insanity defence contributes to that stigma by reinforcing the common misconception that mentally ill

23. Mental Health Act 1983, ch. 20, Part 3, s. 37.
24. Domestic Violence, Crime and Victims Act 2004, Sched. 3, s. 116A (1–6).
25. R.D. Mackay, B.J. Mitchell and L. Howe 'Yet More Facts about the Insanity Defence'. [2006] Crim LR 399–411.
26. R.D. Mackay, 'Ten More Years of the Insanity Defence' [2012] Crim LR 946–54.
27. A. Loughnan, 'Manifest Madness: Towards a New Understanding of the Insanity Defence' (2007) 70(3) *Modern Law Review* 379–401.
28. M.S. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge University Press: Cambridge, 1984) 223, cited in Law Commission, above n. 1 at ch. 2, s. 2.20.
29. See G. Ryle, *The Concept of Mind* (Chicago University Press: Chicago, IL, 1949).
30. A. Loughnan, 'Mental Incapacity Doctrines in Criminal Law' (2012) 15(1) *New Criminal Law Review* 1–31.

individuals are more or differently dangerous than the mentally well.[31] The presence of a separate 'insanity' defence and a separate 'Special Verdict' plays into the idea that mental illness and criminal behaviour are specially linked, when in fact recent studies have indicated that mentally ill and disordered individuals are no more likely to engage in criminal behaviour than the mentally healthy and are, in fact, significantly more likely to be the victims of violent crime than the perpetrators.[32]

A final point in the abolitionists' favour is the danger of relying too heavily upon one particular defence designed to account for incapacity on grounds of mental illness. The concern is that by doing so, we leave those mentally ill defendants who do not meet the requirements for an insanity plea with little to no recourse. There has been much discussion over the fact that the insanity defence does nothing for the defendant who knew what he was doing and that his actions were wrong but who was, due to the nature of his condition, unable to prevent himself from acting. Suggestions to reform the law to include a provision for the defendant with irresistible impulses have been put forward on a regular basis, from the proposals of the committee under Lord Atkin in 1923 to the recent scoping paper and discussion of the Law Commission in 2013, but the law has yet to change accordingly. A compulsive defendant who has been charged with murder may plead diminished responsibility, which makes provisions for such an impairment;[33] for all other offences he remains without recourse.

One could argue that the solution to this problem is reform, but the limitations of the defence regarding compulsive defendants is indicative of a wider problem. However the defence is formulated, there will be mentally ill defendants who fall outside of it; who are, despite their mental dysfunction, ineligible to plead insanity. If our efforts to accommodate mental illness and mentally ill defendants is restricted to one or two special defences, those defendants who inevitably fall outside their remit will find themselves facing a legal system which, with respect to liability, is forced to regard them as mentally well.

Consider the defence of loss of control (formerly provocation). The Coroners and Justice Act 2009 followed the earlier case law[34] in confirming that there is a uniform 'reasonable person' test for the degree of control required of the defendant, with the only variable characteristics being age and sex. That is to say that a defendant is expected to display the self-control of an individual of the defendant's age and sex, with a normal degree of tolerance and self-restraint.[35] Now, suppose a defendant suffers from a disorder which makes it extremely difficult for him to control his anger. Such a defendant will have to exert a far greater degree of mental effort to control himself than a mentally well defendant under equally aggravating circumstances. As such, by subjecting both defendants to the same 'uniform' test, a far greater expectation of self-discipline is actually being placed upon the mentally ill defendant. In addition to this being unjust, it raises a troubling question: if a mentally ill defendant can be expected to exert this degree of mental and emotional effort to keep his impulses under control, why is the mentally healthy defendant excused at a lower threshold?

It is all very well to note that the defendant in the above example could plead diminished responsibility; indeed he could, and would be advised to do so. The point remains that when mental illness is accounted for exclusively within one or two specialised defences, those who fall outside the required criteria will inevitably be left subject to unfair expectations.

It is for this reason that we must be wary of complacency within the abolitionist's position. It is misguided to assume that we can simply do away with the insanity defence and rely on the defences and principles we currently have, as they are currently formulated, to do the work necessary to accommodate mentally ill defendants. If we are to advocate for the abolition of the insanity defence we must also

31. C. Slobogin, 'An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases' (2000) 86 *Virginia Law Review* 1199–247.
32. L. Jones, M.A. Bellis, S. Wood, K. Hughes *et al*., 'Prevalence and Risk of Violence Against Adults with Disabilities: A Systematic Review and Meta-Analysis of Observational Studies' (2012) 379(9826) *The Lancet* 1621–9.
33. Coroners and Justice Act 2009, s. 52(1A)(c).
34. *A-G for Jersey v Holley* [2005] 3 WLR 29; *Mohammed* [2005] EWCA Crim 1880; *James and Karimi* [2006] 2 WLR 887.
35. Coroners and Justice Act 2009, s. 54(1)(c).

advocate for a thoroughgoing programme of reform across all defences, with the mentally ill and/or disordered defendant in mind. We will use the defence of duress as a case study to suggest some of the ways in which this could be done.

## A Case Study: Duress

The most important step would be to move towards an entirely subjectivist approach. The current test for duress (established in *Graham*[36] and confirmed in *Howe*[37]) is comprised of two questions for the jury:

1. Was the defendant impelled to act as he did because, as the result of what he reasonably believed the person issuing the threat had said or done, he had good cause to fear that if he did not so act, that person would kill him or cause him serious injury?
2. If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded in the way the defendant did?[38]

The first question is an objective test—the defendant's belief that he was threatened must have been reasonable, and his fear of reprisals must have had 'good cause'. The second question introduces a subjective element; although we are asked to consider a 'sober person of reasonable firmness' we are invited to imbue him with the relevant characteristics of the defendant, including any mental illness or disorder from which he suffers.[39] Both questions introduce difficulties for the mentally ill defendant, and for the jury tasked with assessing his liability.

With respect to the first question, the difficulty is obvious—a defendant whose belief in the existence of a threat to his well-being stemmed (for example) from delusions or paranoia would be unable to rely upon duress, as this belief would not have been 'reasonable'. The second question appears primed to accommodate the mentally ill defendant, but in fact gives rise to confusion. Suppose our defendant suffers from some hypothetical disorder X, which renders him fundamentally incapable of forming rational or proportionate responses under certain circumstances (when exposed to significant emotional strain, for example). Suppose we attribute this disorder X to our 'reasonable and sober' man. The jury are now tasked to decide what is expected of a reasonable sufferer of a condition which fundamentally hinders reasonableness. This is simply not a sensible question, and it is not one we could expect a jury to be able to untangle.

Asking a jury to assess a hypothetical 'reasonable' sufferer of this or that mental impairment—as if a jury could competently assess what, for example, a 'reasonable' sufferer of obsessive compulsive disorder looks like as opposed to an 'unreasonable' such person or, indeed, a 'reasonable' person of perfect mental health—is a poor way to accommodate mentally ill defendants, and to account for the impact their illness may have on their behaviour. In their report *Legislating the Criminal Code: Offences Against the Person and General Principles*,[40] the Law Commission had this to say about general duress:

> . . . our view [is] that the defence should apply where the particular defendant in question could not reasonably have been expected to resist the threat . . . If a person is in a condition that makes it unreasonable to expect him to resist, then he will not resist . . . where the defendant could not reasonably have been expected to act otherwise he should not be convicted of a crime.[41]

36. *R v Graham* [1982] 1 WLR 294.
37. *R v Howe and Bannister* [1987] 2 WLR 568.
38. Paraphrased from *Howe* [1987] 1 AC 417, cited in M. Allen, *Textbook on Criminal Law*, 12th edn. (OUP: Oxford, 2013)
39. Confirmed in *Bowen* [1996] 2 Cr App R 157.
40. Law Commission, *Legislating the Criminal Code: Offences Against the Person and General Principles*, Law Com. No. 218 (1993).
41. Ibid. at para. 29.14.

What the Law Commission appear to be proposing is a 'reasonableness' test in which 'reasonable' modifies the expectations of the jury, rather than a hypothetical individual against whom we are to compare the defendant. If such a test were to be adopted, it would be an important step towards accommodating mentally ill defendants within the criminal justice system. On this model, the question for the jury would not be: 'Would a reasonable person have behaved as the defendant did?', but rather: 'Is it reasonable to expect the defendant to have behaved otherwise, given his mental state and capacity (as supported by medical evidence)?' This would allow for a nuanced assessment of the defendant's actual capabilities, taking into account any limitations he may—or may not—have.

Another, perhaps more radical change would be to consider certain types of mental illness as capable of being a source of duress.[42] A compulsive disorder may lead a defendant to feel real fear for her life, or the lives of those dear to her, should she fail to perform certain ritualised tasks. Supposing one or more of those tasks were illegal, need this situation require a significantly different legal analysis to one in which the threat comes from an external source, rather than the defendant's own disordered mind? The defendant's decision—to weigh their life against the criminal act required to save it—is the same in either case. That the disordered defendant is incorrect in believing her life to be at risk, and that this false belief is the result of illness, may appropriately affect the decision of the judge regarding disposal—perhaps a supervisory order is required rather than an outright acquittal. It does not seem clear, however, that it should affect liability. Certainly it does not seem as though the compulsive defendant should be *more* liable than their mentally healthy counterpart, which would be the outcome were the duress defence barred to them.

## Conclusion

The insanity defence should no longer be a part of English law. Mentally ill people are not a discrete category, fundamentally different in kind from the mentally healthy, that can be dealt with by one or two separate, specialised defences. They make up a significant proportion of incarcerated individuals,[43] and it is vital that the criminal justice system makes space for them at every level, with respect to both liability and procedure.

Rather than focusing our energies on debating the reform of a single outdated defence, we must strive to ensure that all available defences are constructed in such ways as to apply fairly to mentally ill individuals. If this manner of thoroughgoing reform is adopted, I think we will discover that the already infrequently pleaded insanity defence will fall entirely out of use, without the need for active abolition. It will simply no longer be required.

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The author declares that there are no conflicts of interest.

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42. Slobogin, above n. 31.
43. A 1997 survey by the Office of National Statistics indicated that over 50 per cent of prisoners displayed neurotic symptoms, such as compulsions or depression, while around 10 per cent suffered from functional psychosis: Office of National Statistics, *Psychiatric Morbidity Among Prisoners: Summary Report* (ONS: London, 1997). Although this report is now fairly old, subsequent research indicates that the figures remain relevant (Lord Keith Bradley, *The Bradley Report: Lord Bradley's Review of People with Mental Health Problems or Learning Disabilities in the Criminal Justice System* (Department of Health: London, 2009).