When does the insanity defence apply? Some recent cases

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***Crim. L.R. 788** The Law Commission for England and Wales has recently published a discussion paper reviewing the insanity defence which makes a number of provisional proposals for its reform. [1] It cannot be assumed, however, that these proposals will be debated within the legislative process. The Commission has prioritised achieving reform of the unfitness to plead procedure. [2] Its proposals for the insanity defence are in abeyance, and the insanity defence in its current form may be with us for some considerable time yet. On that assumption, it may be useful to consider some recent Court of Appeal cases concerning the insanity defence, which raise queries about when and on what terms the defence applies.

It is very difficult to discuss the insanity defence and avoid major critique of its nature and scope. The first thing to strike anyone studying the current defence is that it labels as insane persons who are manifestly not insane within any natural or medical meaning.[3] And there is under inclusion too: persons who are seriously deranged may not be insane within the terms of the law.[4] The final part of this paper will return to these themes. However, our aim is not to discuss further matters well considered elsewhere.

This paper provides a "first principles" analysis of the role and application of the insanity defence. The defence works primarily as a mechanism for qualifying the normal rules of criminal liability as applied to mentally disordered offenders, balancing D's individual (lack of) blameworthiness against the need for public protection. In order to perform this role effectively, we contend that the insanity defence must have an *exclusionary* effect. If the elements of the defence are satisfied, it should be applied at the exclusion of other overlapping (and otherwise ***Crim. L.R. 789*** alternative) rules. For example, where D might otherwise escape liability on the basis of lack of mens rea or via an alternative defence,[5] if his plea is founded either directly or indirectly on a defect of reason arising from a disease of the mind, the insanity defence should be applied to the exclusion of these alternatives. Having established doctrinally this exclusionary effect in Pt 1, Pt 2 examines a number of recent cases where it has not (or has not fully) been recognised. These cases also prompt reflection in Pt 3 on which conditions should be categorised as a disease of the mind for the purposes of the insanity defence.

1. The exclusionary application of the insanity defence

The insanity defence is unique among criminal defences. As with other defences, there is an assessment of D's lack of blameworthiness at the time of the prima facie criminal event. The *M'Naghten* rules reflect this by requiring a defect of reason and a consequent inability to understand the nature of actions and/or their wrongfulness. But the insanity defence is also forward looking. The requirement within the *M'Naghten* rules that D's defect of reason (his lack of blameworthiness) was caused by a "disease of the mind" distinguishes the insanity plea from raising automatism and/or lack of mens rea, identifying those defendants who seem more likely to pose a danger to others in the future. How accurately these potentially dangerous individuals are identified within the *M'Naghten* rules is often (and understandably) the focus of critical concern.[6] However, whatever the difficulties, the need to identify individuals who should be subject to supervision and restraint rather than released unconditionally is vital.

Once "selected" for the insanity defence, the forward looking focus is encapsulated by the verdict of "not guilty by reason of insanity". This qualified acquittal requires the court to assess any continuing danger posed by the defendant and consider whether compulsory detention, treatment, and/or supervision is desirable.[7] These disposal options reflect a defence which acknowledges *both* D's lack of culpability at the time of his prima facie crime, and his future potential dangerousness. Indeed, these forward looking aims ground the exclusionary claim of the insanity defence, providing a *via media* between the unsuitable extremes of conviction or unqualified acquittal.[8]

Before we move in Pt 2 to discuss a number of recent problematic cases in this area, it is important to re-assert the exclusionary role of the insanity defence. There will be occasions where the only available defence is insanity and accordingly it will be applied without exclusionary effect. Take the case of D, who kills V because of his deluded beliefs that he has received a divine order to do so and that it is lawful to comply with divine orders. Here the only route to a not guilty verdict for any offence charged is the insanity plea and no issue of exclusionary effect arises. ***Crim. L.R. 790*** There are, however, two core scenarios where the insanity defence should be applied to the exclusion of alternative rules.

D lacks elements of an offence due to insanity

Unlike the divine orders example above, we deal here with cases where one or more elements of the offence charged may be missing. Where this is due a defect of reason arising from a disease of the mind, D will not be granted an unqualified acquittal. Rather, the insanity defence will be applied at the exclusion of the standard rules of criminal liability, allowing D to avoid a conviction only if he submits to the special verdict. In cases of this kind, the impact of the insanity defence is in substance inculpatory.

Suppose D is charged with dangerous driving but claims he lost control of the vehicle for reasons beyond his anticipation, such as a sudden attack from a swarm of bees. There are dicta of high authority suggestive that D may avoid liability if the involuntary movements made in response to bee stings (or a blow to the head, etc.) do not constitute the activity of driving.[9] These dicta

provide to the same effect for epileptic fits and strokes. But as the House of Lords has decided that an epileptic fit is a token of legal insanity, [10] and because logic and authority [11] would likewise classify strokes, D is confined to raising insanity. [12] Thus, if in the course of a fit D makes forceful contact with V, it is well established that the actus reus of assault by beating will be present even if his mental disorder deprived him of any control over his bodily movements. [13] As for the mens rea of assault by beating, it need not be proved by the prosecution. [14] D, if he chooses to argue insanity will need to prove on a balance of probabilities that he was unaware of the nature and quality of his actions. Otherwise he will be convicted of the offence. [15] The inculpatory dimension of the insanity defence is acknowledged by providing a right of appeal against a special verdict. [16]

The operation and scope of the insanity defence, in its inculpatory and exclusionary roles, is finds clearest expression in the case of *Sullivan* . [17] D, during a visit to V, experienced an epileptic seizure and while in that state lashed out at V. He was charged with assault occasioning actual bodily harm. [18] D claimed a lack ***Crim. L.R. 791*** of mens rea at the time of his seizure. The House of Lords ruled that the only defence available to D was insanity. [19]

Sullivan confirms that a disease of the mind is any internal condition that causes a defect of reason in the sense of impairing the faculties of memory, reason and understanding. It is irrelevant if the loss of faculty is a temporary occurrence. The insanity defence blocks any other answer to the charge which is based on a defect of reason arising from an internal condition and occurring at the time of the actus reus. So, on facts such as *Sullivan* , a simple denial of mens rea is disallowed. The blocking presence of the insanity defence denies D the chance to say I did not do anything in the form of a volitional movement. He can only say that he did not appreciate the nature and quality of what he is deemed to have done or, if he did, that it was wrong. Although D's conduct is not blameworthy, and is deserving of a defence, the public interest in security requires D to remain within the jurisdiction of the court under the terms of the special verdict. As stated by Lord Diplock:

"The purpose of the legislation relating to the defence of insanity, ever since its origin in 1800, has been to protect society against recurrence of the dangerous conduct." [20]

If D does take up the insanity defence he will remain within the jurisdiction of the trial court whether the defence succeeds or fails. Persons who may have a propensity for unpredictable dangerousness are subject to control. [21]

D may satisfy an alternative defence due to insane delusions

The final exclusionary application of the insanity defence arises where there is an apparent clash between alternative defences. The rationale of the insanity defence exemplified by *Sullivan* , diverting D towards the special verdict despite his lack of mens rea, [22] should extend in logic and in policy to cases where D would like to escape liability by raising an alternative defence (e.g. mistaken duress or mistaken self-defence). In such cases, although D's putative defence may demonstrate a lack of blameworthiness at the point of offending, if it comes from a defect of reason arising from a disease of the mind, D should be diverted to the (forward looking) special verdict. Again, the application of this rule, excluding the potential for an alternative defence that may have led to an unqualified acquittal, is in substance inculpatory. [23]

Suppose a situation where D is visiting V, and becomes subject to a psychotic delusion that V is possessed by the devil and is about to launch a deadly attack upon him. He makes a pre-emptive strike and consequently is charged with assault. D raises mistaken self-defence. Following the *M'Naghten* rules, D's delusional ***Crim. L.R. 792*** mistaken self-defence could be interpreted as D not knowing that what he was doing was wrong (thus qualifying within the insanity defence). Alongside this, D's conduct may be more straightforwardly analysed within the third (rarely discussed) limb of *M'Naghten*: the delusion rule. [24] When discussing this rule in relation to mistaken self-defence, Tindal L.C.J. remarked that D

"… must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment." [25]

The remark that D will be "exempt from punishment", is intended to mean that D will be able to rely on the insanity defence, *not* because of a reliance on self-defence. This was clear at the time the *M'Naghten* rules were formulated because (at that time) self-defence was not available in relation to an objectively unreasonable anticipation of force. [26] Thus, the only potential route

to exemption in these circumstances would be through the defence of insanity. However, under the current law, as pleas of mistaken self-defence can be based on unreasonable mistakes, [27] it would be very tempting for defence counsel to argue that the road is not blocked to raising an ordinary plea of mistaken self-defence, thereby avoiding the label of insanity and the range of disposal orders available under the special verdict. [28]

We argue that this scenario comes within the exclusionary rationale of *Sullivan* , there being no difference from a public protection perspective between a claim to lack mens rea and a claim to a belief in the need for self-defence if in either case the plea is grounded on a defect of reason arising from what the law considers a disease of the mind. [29] In both cases, D may not be blameworthy for the harm he has caused, but the rationale of the forward looking insanity defence is still engaged: there is still a strong interest in protecting the public from future potential harm. Therefore, when the insanity defence is engaged, it must exclude all other potentially available defences associated directly or indirectly to the defect of reason. [30]

Across each of the two exclusionary claims discussed above, the full impact and role of the insanity defence is apparent. In order to work effectively, the defence aims to acknowledge D's lack of blameworthiness, whilst also protecting the public from future harms. It does so by excluding D's liability for the offence, but also by excluding the possibility of D's unqualified acquittal via lack of offence elements or an alternative defence: in each case D will be directed to the insanity defence and the special verdict. However, recent case law muddies these waters. ***Crim. L.R. 793***

2. Undermining the exclusionary application of the insanity defence?

A number of recent cases have begun to raise doubts as to the exclusionary application of the insanity defence. This has occurred in cases where D uses his mental disorder to demonstrate a lack of mens rea and also in cases where he seeks to establish an alternative defence. However, as we will see, this has not developed from a principled rejection of the exclusionary application of the insanity defence. Indeed, the rationale of that application (the protection of the public) is often very clear in court judgements. Rather, the courts seem to have overlooked or narrowly conceived the insanity defence, manipulating other legal rules to secure public protection. Not surprisingly, the results of this are marked with complexity and often incoherence.

A useful example is the case of *B* . [31] In this case, D, a paranoid schizophrenic, believed that he had sexual healing powers. In that delusional frame of mind, he had sexual intercourse with his wife V without her consent. He claimed to believe that what was merely submission on the part of V was in fact consent. If strictly confined to its facts and outcome, *B* is a simple case. The uncontested expert testimony was to the effect that D's schizophrenia did not prevent him from knowing the difference between submission and consent, [32] and on that basis he was clearly sane within the terms of the law. In substance, the trial judge directed the jury to convict D of rape if sure that a reasonable person in the same external circumstances as D would have been aware that V was merely submitting and not consenting.

The decision was upheld on appeal. But importantly for present purposes, careful consideration was also given to the question of what the position would have been if his schizophrenia had induced a belief that V was consenting. Apparently, nothing would change:

"We conclude that unless and until the state of mind amounts to insanity in law, then under the rule enacted in the Sexual Offences Act beliefs in consent arising from conditions such as delusional psychotic illness or personality disorders must be judged by objective standards of reasonableness …." [33]

But surely the rule has no application on the facts posited? Within the changed hypothetical facts, because of a defect of reason arising from a disease of the mind, D did not believe that his sex act was wrong in law or morals because it was consented to. Furthermore, arguably D did not appreciate the nature and quality of his act, there is a radical difference between consensual and non-consensual penetration. Indeed, the reason for the finding that his schizophrenia was a condition falling short of insanity on the facts of the case, was that D *could* tell the difference between consensual and non-consensual penetration. But where D has a delusional belief that V is consenting, he should be denied any access to the statutory claim of reasonable belief and be instructed that he is raising a defence of insanity. If faced with that option, acceptance of an insanity plea would allow restraint of a ***Crim. L.R. 794*** dangerous man and, in a well ordered world, treatment for his schizophrenia. Refusal of the defence assures restraint.

Similar confusion concerning the exclusionary effect of the insanity plea arises in *C*,[34] where D heard voices and experienced hallucinations, consequent to abstaining abruptly from alcohol after days of heavy drinking. He complied with an imagined instruction to set fire to his flat, giving rise to a serious risk that adjoining properties might also catch fire. The Court of Appeal ruled that D's symptoms amounted to a defect of reason from a disease of the mind rather than a condition that raised issues relating to intoxication. In a rather cut and dried way, the condition of D was attributed to the absence rather than the effect of alcohol and, in the view of the court, stemmed from some factor internal to D.[35] The Court of Appeal considered that if that analysis had been made at trial, an insanity plea to the charge of arson would have failed, because D would have been aware of the nature and quality of what he was doing when he set fire to his flat. On the charge of aggravated arson, however, the Court of Appeal quashed the conviction because it considered that he may have lacked the subjective recklessness the offence requires: because of his mental state, there was doubt about his foresight of the risk to the properties of his neighbours.[36]

Accordingly, if matters had been resolved in the right way at trial, D could have defended himself on the more serious charge by way of a simple plea of lack of mens rea. However, this repeats the error made in *B*. The failure to foresee the risk to adjoining properties arose from of a defect of reason arising from a disease of the mind. Why is this not a failure to know the nature and quality of his act? Cases already referenced, such as *Sullivan*, *Hennessy* and *Kemp* disallow pleas of lack of mens rea to charges of aggravated assault if the failure to perceive the consequences of one's act stems from a defect of reason arising from a disease of the mind. These cases demonstrate that for the purposes of determining whether D knew the nature and quality of his act, the consequences of his act are part of the act description. The same analysis surely applies to aggravated arson. In *Harris*, D may have understood that he was lighting a fire, but if because of his mental disorder he did not appreciate that it would spread, he was unaware of the nature and quality of his act taken in its totality. However, the Court of Appeal did not address the issue. Having decided that insanity could not be raised in answer to the charge of simple arson, insanity is not heard of again when the aggravated charge is discussed.

Silence in relation to the potential application of insanity is apparent in several previous cases. And where it is not applied, the equally inappropriate extremes of conviction or unqualified acquittal are all that remain. For example, in the earlier case of *Stephenson*,[37] D made a hollow in a hayrick for the purposes of sleep. He lit a fire to warm himself. As a consequence, the hayrick was set ablaze. D's conviction for arson was quashed on the ground that because of his schizophrenia, he might not have foreseen the risk of the fire spreading. There was no reference to insanity at trial or on appeal. A similar silence, but with the opposite result, was ***Crim. L.R. 795*** seen in *Ratnasabapathy*.[38] Under the tragic facts of this case, D (who suffered from autistic spectrum disorder (ASD)) was charged with causing grievous bodily harm with intent when force-feeding his baby. Although the defence relied on D's ASD in an attempt to deny mens rea, highlighting D's impaired ability to understand the consequences of his actions, there was no mention of the insanity defence, and the jury were left with a straight choice between guilt or not guilty.[39] D was convicted, and later committed suicide.

These cases all involve inconsistencies where D lacks (or potentially lacks) mens rea due to a condition that would also satisfy the insanity defence. However, looking beyond such cases, we also see similar problems arising where D's insane delusions present a clash of potential defences: cases where, as we have said, the insanity defence should be applied at the exclusion of alternative defences. This is illustrated in the recent case of *Oye*.[40] In this case, D, a man with no previous convictions, became gripped by delusions that police officers were agents of evil spirits out to destroy him. He launched a series of attacks on a number of officers and was charged with affray and maliciously inflicting grievous bodily harm.[41] The first psychiatric examination of D concluded that the delusions arose from the consumption of strong cannabis but later there was agreement between the two consulting psychiatrists that they were the symptoms of a "florid psychotic episode" arising from some (unspecified) internal condition.[42] D raised mistaken self-defence at trial. The trial judge insisted that the defence of insanity should also be put in play but, crucially, he did *not* exclude mistaken self-defence as an issue. He directed that the defence of insanity should be argued before turning to mistaken self-defence, but in his summing up, he directed on self-defence first.

If the trial judge was correct to leave both defences to the jury, he was surely correct to direct on the self-defence issue first. Had the jury decided that issue in D's favour their deliberations should have ended there. Surprisingly, the jury were not given a direction on those lines. An unqualified acquittal on a ground that answers all charges entitles D to his freedom. The jury cannot go on to undermine their own decision to allow an unqualified acquittal to all charges by additionally granting a qualified acquittal in respect of all charges. Interesting issues might have arisen under art.5 of the European Convention for Human Rights if the judge had received verdicts in D's favour on mistaken self-defence and insanity and then issued restrictive orders under the jurisdiction that a special verdict allows. He was saved from what would have been a self-inflicted tangle by the jury's verdict of guilty to all charges.

The defence appealed on the grounds of misdirection on mistaken self-defence. The appeal failed, the Court of Appeal endorsing some problematic authority to the effect that delusions and other psychological factors can be taken into account when establishing a belief that force was necessary yet those same factors must be disregarded when assessing whether D's response was a proportionate response ***Crim. L.R. 796*** to the danger he perceived.[43] More relevant for our concerns is that the court quashed D's convictions and substituted a special verdict of not guilty by reason of insanity because of the unanimity of the expert evidence at trial that D was insane for the purposes of the *M'Naghten* rules. The court made reference to the delusional limb of the rules, which (as discussed above) specifically refer to a belief in a need for self-defence.[44] There is no criticism made of the judge's decision to allow self-defence and insanity to run in tandem. There is no mention of *Sullivan* and other high authority suggestive that on facts such as *Oye* , D's defence and only defence is insanity.

If running the two defences at the same time is allowed, it undermines the rationale of the insanity offence. Any defence that will result in an unqualified acquittal to all offences charged must take priority in the jury's order of decision-making. In the event of a finding of unqualified acquittal to all charges, their deliberations should come to a halt. In *Oye* , if the defence of mistaken self-defence had succeeded, a dangerous person would have been released without further check. D's attack on the police officers was furious and sustained, resulting in serious injuries and considerable apprehension to members of the public. The fact that the *Sullivan* , et al. line of authority was not cited and discussed should diminish to vanishing point what authority the Court of Appeal's decision might otherwise have in the matter of allowing insanity and self-defence to run in tandem. It was unfortunate that neither at trial nor on appeal did the prosecution alert the court to authority strongly receptive to eliminating mistaken self-defence as an issue from the outset.

Unfortunately, *Oye* cannot be dismissed as a one-off judicial slip. The Court of Appeal in *B* , referenced above, allowed D, a paranoid schizophrenic to raise the issue of reasonable belief in consent albeit on terms that guaranteed failure of the defence. This was of no great consequence, given the fact that his mental condition did not deprive him of the capacity to differentiate between consent and non-consent. But the court would have taken the same stance if his schizophrenia had deprived him of that capacity. The problem, as argued above, is that the insanity defence surely applies in such circumstances remaindering to complete irrelevance the statutory claim of reasonable belief in consent.

There is a historical reluctance to employ the insanity defence. Defendants wish to avoid the stigma of being labelled insane and fear the uncertainty of the special verdict. Courts rarely encounter the defence in practice. The latest recommendations from the Law Commission offer considerable promise for a more user friendly defence.[45] The proposal to change the name and scope of the defence from the "insanity defence" to the "recognised medical condition defence" is likely to have a positive impact in undermining the defence's stigma. However, whether or not the Commission's proposals are taken forward, the problems with the current defence should not be permitted to excuse avoidance or misapplication in cases where the special verdict is necessary for public protection. Where D satisfies the ***Crim. L.R. 797*** elements of the insanity defence, it must be applied at the exclusion of other legal rules.

3. The future of the exclusionary application of the insanity defence

So where do these cases leave the claimed exclusionary application and effects of the insanity defence? *Sullivan* involved the blocking of a plea of lack of mens rea based on a failure by D to perceive the injurious consequences of his actions (recall that the spasm-like actions of his limbs were deemed to be his acts). As *Sullivan* demonstrates, no distinction for the purposes of the *M'Naghten* rules can be made between an act of itself and physical consequences that are caused by the act. Both aspects of the act token are accommodated by the phrase 'nature and quality of his act.' On this basis, the Court of Appeal's decision in *Harris* to quash D's conviction for aggravated arson because of lack of mens rea seems incorrect. The same applies to *Stephenson* : no distinction can be drawn along the lines of setting the fire and the spread of the fire, with the *M'Naghten* rules only going to the former.

Where the defence issue relates to something other than mens rea, the clash with *Sullivan* is not so stark. In *Oye* the issue was mistaken self-defence. Surely though, the underlying rationale of *Sullivan* and supporting authority is that if a defence raised by D can on the facts that he adduces in his favour be brought within the insanity defence, it is the insanity defence that prevails. On that basis, the approach taken in *B* as well as *Oye* is also incorrect. All the cases discussed are bereft of any discussion of the exclusionary blocking effect of the insanity plea. However, the blocking principle upheld by the House of Lords in *Sullivan* is extant. It needs more consistent recognition.

Beyond these immediate problems, the recent cases discussed in Pt 2 also raise a secondary issue that requires some discussion. This is because, as well as overlooking the exclusionary role of the insanity defence, a number of these cases have also suggested a narrowing of the defence. There has been a tendency from the courts to interpret insanity narrowly or inconsistently, particularly in relation to internal (insanity) and external (non-insanity) causes. This represents a further way in which the defence (and with it the special verdict) is being denied.

In *Oye* , the first consultant psychiatrist to examine D attributed the belief in spirit possession which triggered his violent outburst against the police to the smoking of cannabis. [46] As noted above that diagnosis changed on further consultation with another psychiatrist to a "florid psychotic episode." This seems more a description of D's condition at the relevant time, rather than a diagnosis of some underlying pathology. Crucially, the final diagnosis, as thin as it was, relegated D's cannabis use to a background factor rather than a causal influence. The way was open for the tortuous process that ultimately resulted in a special verdict. If the first diagnosis had prevailed things would have been more straightforward. In legal terms D, at the time of his violent conduct, would have been voluntarily intoxicated and guilty of the basic intent crimes for which he was ***Crim. L.R. 798*** charged. No question of some internal condition precipitating his violence would have arisen for discussion. For instance, in *Coley*, [47] D, a person of "impeccable character" had been smoking strong cannabis throughout the day and playing violent video games while doing so. He went to bed, got up some two hours later, changed into combat fatigues, and used his free access to the home of his neighbour V to enter and repeatedly stab him with a hunting knife. D had no recollection of the event and was fully cooperative with the police. Expert evidence was given on his behalf that his cannabis taking could cause a "brief psychotic episode." [48] The Court of Appeal upheld the rejection of the trial judge of the argument that this cannabis induced psychotic episode was a disease of the mind for the purposes of the insanity defence.

The inculpatory effect of voluntary intoxication is often justified on the ground that a self-induced incapacity should not excuse. That adage seems entirely in point in situations such as when a group of heavy drinkers fall out among themselves and start fighting to the alarm of those around them. "Sorry, I was drunk", is not enough by way of excuse. But go back to the case of *Harris*. D would not have heard a voice telling him to set fire to his home but for his earlier heavy drinking. But even if he had been involved in similar incidents before following abrupt periods of abstinence, it seems intuitively inappropriate to lump D with the crowd of anti-social heavy drinkers referenced earlier. He needed to be controlled; he also needed to be helped.

And the same would apply to D in *Oye* even if the first diagnosis of a cannabis induced psychotic episode had stood. The final diagnosis (florid psychotic episode) though vital in legal terms is, at least for the lay person, not particularly illuminating. The fact that D had no history of mental health problems, no previous convictions and became stable shortly after his violent attacks (a condition that still obtained at his trial) adds to the puzzlement. What does seem clear is that D is not the typical defendant who has to resort to his state of intoxication as a factor which might deflect liability for any specific intent crime for which he is charged. Assuming that he was a regular cannabis user who had not experienced such terrifying delusions before, they would have come out of the blue. [49] In England and Wales, cannabis, including super-strength cannabis, is consumed in very large quantities. The amount of cannabis induced violence is tiny compared to the violence perpetrated by persons disinhibited by the alcohol they have consumed. [50]

The facts of *Oye* and *Coley* have a lot in common. There is cannabis use (though not at the time of the offence in the case of *Oye*), then very serious violence, perpetrated in a delusional state. In *Oye* , D's violence is taken to arise from an internal condition and in *Coley* it is attributed to the external influence of cannabis. It is very difficult to know for sure why the respective defendants acted in such a ***Crim. L.R. 799*** violent fashion. In *Burgess* , [51] D performed a violent act, seemingly in his sleep. There was no explanation to hand. Reasonably enough, the Court of Appeal insisted that there must be an explanation, whatever it was. As there was no evidence of any external cause, the cause had to be some form of internal disorder. Accordingly that condition, whatever it was, constituted a disease of the mind, within the scope of the *M'Naghten* rules.

Burgess gives us the right approach for cases such as *Oye* and *Coley*. In the former case the medical diagnosis is merely a description of D's condition. In the latter case D's delusional state is put down solely to cannabis. But unless it was cannabis with specific delusion creating properties which would have affected anyone taking the drug, it seems safe to assume that in addition to the drug, there were also dispositional factors internal to D which created his mental condition at the time of his acts. [52] As *Burgess* explains, for the purposes of the law there is no need to identify these dispositional factors. It is enough that the presence of dispositional factors is the best explanatory hypothesis for the condition of D. If this approach is taken we can put the cases discussed in this section— *Oye* , *Coley*, *Harris* —on the same page. None of these cases were typical intoxication cases as when D's violent nature comes to the fore as he becomes disinhibited. All the defendants were in the grip of a delusional state, a state which, unless there were reasons for knowing it would come about, eliminated the culpability

required for convictions for offences of violence. [53] But they were dangerous men. They should all be given the chance to raise the defence of insanity, which would avoid conviction and might provide access to help and support. If they decline they face conviction. Either way, the public interest in security is served.

Conclusions and concerns

The rationale for the insanity defence is easily stated. Where D acts in a harmful manner, but lacks blameworthiness due to some internal condition that caused him to lack understanding of his acts and/or there wrongfulness, whilst his acts should be excused, the court should consider a disposal order that will protect the public from such harms in the future. If this rationale is accepted, the role of the special verdict is crucial. But alongside this, the consistent application of the exclusionary claim of the insanity defence is also crucial. Whenever D satisfies the insanity defence, whether he commits every element of the full offence or not, and whether he may be able to rely on an alternative defence or not, the insanity defence must be applied in preference: the court must be enabled to consider how D can be helped, and others protected. Where the courts have lost sight of this, either by failing to consider the insanity defence in an exclusionary manner, or by interpreting ***Crim. L.R. 800*** it and applying it too narrowly or inconsistently, it is necessary to restate its central importance. Following from this conclusion, we finish by highlighting two related areas of uncertainty that whilst not central to the cases discussed above, have the potential to cause problems in the future.

First, looking forward, there are details within the exclusionary application of the insanity defence that require judicial clarification. Most importantly, within the inculpatory role of the insanity defence, we should consider what conduct on the part of D provides the sufficient threshold to unlock the application of the insanity defence. For example, in *Sullivan* , D's defence was diverted to insanity (which he must then prove) where he did not act with any mens rea, and with no control of his body. Whilst this seems correct in the context of *Sullivan* where D caused serious bodily harm to his victim, it must be recognised that this approach creates a considerable switching of burden to the defence, requiring D to demonstrate insanity or to face liability. Therefore, it may not be appropriate to apply the insanity defence in this way where D only completes the actus reus elements of certain other offences. For example, where D merely completes the actus reus elements of an inchoate offence, or a more minor offence, and does so without mens rea, it would not seem appropriate to bring D within the insanity rules and expose him to potential compulsory detention and treatment. With this in mind, it would be useful to clarify which range of harmful (but not necessarily criminal) acts will be sufficient for D to be brought within the insanity rules and be led towards the special verdict. This may, one would assume, be rightly limited to cases in which D has caused or threatened to cause more than minor harm to a person or property. [54]

A second area of confusion, unresolved within the current law, arises through a potential conflict between the delusional limb of the *M'Naghten* rules and the knowledge of wrong limb. Let us return to the delusional self-defence example in *Oye* . Suppose that during his police interview D said that he knew he would get into trouble for striking V because only he knew that V was a demon. There is strong authority that awareness that your acts will get you into trouble with the law is tantamount to knowledge that your acts were wrong. Therefore, D would satisfy the delusion limb, but appear to fail the knowledge of wrong limb. How this conflict should work out in terms of textual analysis is conjectural. [55] In terms of doing a measure of justice to D as well as serving security requirements, the analysis should favour accommodating D's situation within the rules. There is a public interest in blocking D's access to the rule that allows an unreasonable belief in the need to use force in self-defence to provide a complete exemption from criminal liability if his delusional beliefs may recur. However, it would not be any compensation for D to divert him to an insanity defence that might fail on the facts he adduces in his favour. If the insanity plea is to be deployed to deprive D of another defence that would otherwise apply, it is essential that the insanity defence is applicable to D's circumstances. The judge must be able to assure D that on the facts that D adduces in his favour the insanity defence will be applicable unless the prosecution disproves those facts. Then D is given the choice to go down a ***Crim. L.R. 801*** path which may put on record that he was not guilty of any crime or, alternatively, accept liability for the crime.

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Footnotes

1 *Law Commission, Insanity and Automatism (Discussion Paper, 2013)*.

2 *Law Commission, Unfitness to Plead (Consultation Paper no.197, 2010)*, the report is expected in early 2015.

3 This is most obviously the case when conditions such as epilepsy and diabetes are, in the eye of the law, considered tokens of insanity.

4 See, for example, Loughnan, ""Manifest madness": towards a new understanding of the insanity defence" (2007) M.L.R. 379; Mackay and Reuber, "Epilepsy and the Defence of Insanity—Time for Change?" [2007] Crim. L.R. 782; Mackay and Mitchell, "Sleepwalking, Automatism and Insanity" [2006] Crim. L.R. 901.

5 This will also include a denial of actus reus. In practical terms a plea of lack of actus reus based on a condition of automatism arising from a disease of the mind would only be made in the context of offences of negligence and strict liability. In *DPP v H [1997] 1 W.L.R. 1406* the Divisional Court took the view that the insanity plea could only be raised in response to crimes of mens rea. For criticism of this narrow view of the insanity plea, see Ward, "Magistrates, Insanity and the Common Law" [1997] Crim. L.R. 796.

6 See, for example, Mackay, "Fact and Fiction about the Insanity Defence" [1990] Crim. L.R. 247; Mackay, Mitchell and Howe, "Yet More Facts about the Insanity Defence" [2006] Crim. L.R. 399.

7 Criminal Procedure (Insanity) Act 1964 s.5 .

8 *Law Commission, Insanity and Automatism (Discussion Paper, 2013), Ch.2*.

9 *Hill v Baxter [1958] 1 Q.B. 277* at 282 (Goddard L.C.J. and Pearson J.).

10 *Sullivan [1984] A.C. 156* .

11 *Kemp [1957] 1 Q.B. 399* .

12 He may be denied any defence at all if the insanity plea cannot be raised because the crime is an offence of strict liability: see fn.5 above.

13 As well as *Sullivan [1984] A.C. 156* and *Kemp [1957] 1 Q.B. 399* there are many other decisions such as *Hennessy [1989] 2 All E.R. 9* and *Burgess [1991] 2 All E.R. 769* where persons in a state of automatism arising from an internal disorder were assumed to have perpetrated the conduct elements of assaults leaving the borderland between a plea of insanity and a claim to have lacked mens rea as the only issue to be resolved. A comparison can be made with states of voluntary intoxication where the leading case of *Majewski [1977] A.C. 443* establishes that a person in a state of drunken automatism who causes harm to the person or property of V will be deemed to have perpetrated with mens rea the actus reus of any basic intent offence which corresponds to the harm caused. See further Simester, "Intoxication is Never a Defence" [2009] Crim.L.R. 3.

14 The cases cited at fn.13 above establish beyond question that if the explanation for D's lack of mens rea are to be found in the symptoms arising from an internal disorder the applicable defence is insanity, thereby relieving the prosecution from the burden of proving mens rea.

15 *Carr-Briant [1943] K.B. 607* .

16 Criminal Appeals Act 1968 s.12 .

17 *Sullivan [1984] A.C. 156* .

18 Offences against the Person Act 1861 s.47 .

19 In accord with *Bratty v Attorney General of Northern Ireland [1963] A.C. 386* .

20 *Sullivan [1984] A.C. 156* at 172.

21 On the comparative ineffectiveness of other legal rules to achieve the same object, see, *Law Commission, Insanity and Automatism (Discussion Paper, 2013), paras 2.23–2.29*.

22 And in the absence of prior fault. Where D lacks mens rea due to his own prior fault, the law has developed methods of constructing liability based on this prior fault. There is no reason why this approach should not be extended to insanity, and this has been proposed by the Law Commission. However, such cases are outside

of the focus of this paper. See *J.J. Child, "Prior fault: blocking defences or constructing crimes" in Reed and Bohlander (eds), General Defences in Criminal Law (Ashgate, 2014 forthcoming)*.

23 *Law Commission, Insanity and Automatism (Discussion Paper, 2013)*. Interestingly, although the Law Commission highlight the importance of managing the relationship between insanity and other defences, para.2.32, they do not go on to recognise this exclusionary role within their recommended scheme, para.4.133.

24 *Williams, Criminal Law: The General Part, 2nd edn (Gaunt, 1961), pp.497–507*.

25 *M'Naghten [1843] UKHL J16* at 211.

26 *Foster, Crown Law, 3rd edn (1792), p.265*.

27 *Williams (Gladstone) [1987] 3 All E.R.411* ; *Beckford [1988] A.C. 130* .

28 In *Oye [2013] EWCA Crim 1725; [2014] 1 All E.R. 902* , the trial judge permitted pleas of mistaken self-defence and insanity to run in tandem (both defences were rejected by the jury) and was not subjected to any criticism for his permissive stance by the Court of Appeal. We discuss *Oye* further below.

29 *Law Commission, Insanity and Automatism (Discussion Paper, 2013), para.2.32*.

30 Judges will be required to highlight to D that the presentation of his intended defence (e.g. self-defence), because it is based on delusions, actually amounts to a defence of insanity or no defence at all.

31 *B [2013] EWCA Crim 3; [2013] 1 Cr. App. R. 36* (p.481).

32 *B [2013] EWCA Crim 3; [2013] 1 Cr. App. R. 36* (p.481) at [34].

33 *B [2013] EWCA Crim 3; [2013] 1 Cr. App. R. 36* (p.481) at [40].

34 *C [2013] EWCA Crim 223* . See R. Mackay's Commentary on *R. v Coley*; *R. v McGhee*; *R. v Harris* [2013] Crim. L.R. 923 at 926.

35 *C [2013] EWCA Crim 223* at [54].

36 *C [2013] EWCA Crim 223* at [69].

37 *Stephenson [1979] Q.B. 695* .

38 *Ratnasabapathy [2009] EWCA Crim 1514* . Discussed critically by the *Law Commission, Insanity and Automatism (Discussion Paper, 2013), paras 2.21–2.22*.

39 As the Law Commission acknowledge at p.35 (fn.23), it is a matter of speculation whether the jury would have accepted an insanity defence in these circumstances. However, in view of the injuries to the child, it is possible that the unpalatable result of finding no liability at all may have pushed them towards a finding of guilt.

40 *Oye [2013] EWCA Crim 1725; [2014] 1 All E.R. 902* .

41 Offences Against the Person Act 1861 s.20 .

42 *Oye [2013] EWCA Crim 1725; [2014] 1 All E.R. 902* at [15].

43 *Martin [2001] EWCA Crim 2245; [2003] Q.B. 1* ; *Cairns [2005] EWCA Crim 2246* .The uncritical adoption of this line of authority doomed the plea of mistaken self-defence to failure and in substance preserved the exclusionary effect of the insanity plea. This is a useful example of the incoherence resulting from the rationale of the exclusionary rule being accepted, but the rule itself being neglected.

44 *Oye [2013] EWCA Crim 1725; [2014] 1 All E.R. 902* at [35]–[36].

45 *Law Commission, Insanity and Automatism (Discussion Paper, 2013)*.

46 *Oye [2013] EWCA Crim 1725; [2014] 1 All E.R. 902* at [13]. On post arrest examination D tested negatively for drugs and alcohol, but confirmed a history of cannabis use [7].

47 *C [2013] EWCA Crim 223; [2013] Crim. L.R. 923* . See, Mackay, "*R. v Coley*; *R. v McGhee*; *R. v Harris*: insanity - distinction between voluntary intoxication and disease of mind caused by voluntary intoxication" [2013] Crim. L.R. 923.

48 *C [2013] EWCA Crim 223* at [9].

49 As there was no evidence of recent cannabis taking (see fn.46 above) the initial diagnosis was presumably based on long term effects making for a close affinity with a state of insanity.

50 See, *Bryan, Del Bono and Pudney, Drug-related crime (Institute for Social and Economic Research Working Paper 2013–08, 2013)*, a study finding a link between cannabis *dealing* and violent crime, but no link from simple possession or use. A larger study in America has found similar results, *Morris et al., "The Effect of Medical Marijuana Laws on Crime: Evidence from State Panel Data, 1990–2006"* available at: http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0092816 [Accessed August 26, 2014].

51 *Burgess [1991] 2 W.L.R. 1206* .

52 The analysis applies where an internal dispositional factor, whatever it was, was the predominant cause of D's condition. There will be cases where various causes of D's condition can be identified as in *Roach [2001] EWCA Crim 2698* (an automatic state caused by personality disorder, prescription drugs, alcohol and fatigue) where the classification will be made on the basis of a predominate cause analysis. In *Roach* the predominate cause was found to be the external factors and a classification of non-insane automatism was made.

53 In *C [2013] EWCA Crim 223* , because D was regarded as voluntarily intoxicated, the only relevance of that condition was to deny the specific intent for attempted murder. As the jury found D guilty of attempted murder, in law there clearly was culpability. Yet any reading of the case leaves a strong impression that D was acting out some delusional belief. Recall in *Oye [2013] EWCA Crim 1725; [2014] 1 All E.R. 902* the jury found D guilty despite guidance from the judge that the right verdict was insanity.

54 For a similar discussion in relation to a potential offence of intoxication causing harm, see R. Williams, "Voluntary intoxication—a lost cause?" (2013) L.Q.R. 264; *J.J. Child, "Prior fault: blocking defences or constructing crimes" in Reed and Bohlander (eds), General Defences in Criminal Law (Ashgate, 2014 forthcoming)*.

55 There is strong indication from the judges in *M'Naghten* that they believed these limbs were compatible.

