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Ten more years of the insanity defence

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***Crim. L.R. 946** This paper contains a brief account of the results of ongoing research into the defence of insanity. To date three studies on insanity have been published in *Criminal Law Review*, the most recent of which analysed the operation of the defence during the five year period 1997–2001. This new study gives an update for the 10 year period 2002–2011. As such it summarises work recently published by the Law Commission as part of its continuing work into insanity and automatism.¹

Before 1990 very little was known about the operation of the defence of insanity other than that the number of those found "not guilty by reason of insanity" (NGRI) was very small. This was confirmed in my first empirical study which revealed that the defence of insanity was rarely used which in the light of the mandatory disposal of indeterminate hospitalisation under the

[Criminal Procedure \(Insanity\) Act 1964](#) was hardly surprising.² This was followed by two other empirical studies both of which were conducted after the introduction of flexibility of disposal under the [Criminal Procedure \(Insanity and Unfitness to Plead\) Act 1991](#). These studies revealed a small but steady increase in findings of NGRI during the 10 year period 1992–2001.³

What follows is a study of verdicts (successful pleas) of "not guilty by reason of insanity" during the 10 year period from 2002–2011 in order to assess the continued impact of flexibility of disposal together with the effect of the changes implemented by the [Domestic Violence, Crime and Victims Act 2004](#). At the outset, however, the limitations of this current study need to be emphasised for, unlike my three earlier studies, on this occasion access to court files, and in particular relevant psychiatric reports, was unavailable. Despite this however, it is hoped that the following research will give an up to date picture relating to insanity verdicts in England and Wales. Although the Statistics of Mentally Disordered Offenders continue to give the number of NGRI cases annually in [*Crim. L.R. 947](#) relation to restricted patients,⁴ no official statistics are published on the use of the insanity defence where other disposals are given. A final caveat, therefore, relates to the consistency of the data which were collected for this study using three statistical returns from the Ministry of Justice. Inevitably, although some disparity has been found in relation to these three sources, as complete a picture as seems possible of NGRI verdicts has emerged for the purpose of this research.⁵

Table 1 — Findings of NGRI by 5 Year Periods from 1987–2011 The research findings

| 1a 1964 Act Final 5 years | | 1b 1991 Act 1st 5 years | | 1c 1991 Act 2nd 5 years | | 1c 1991 Act 3rd 5 years | | 1d 1991 Act 4th 5 years | |
|------------------------------|-----------|----------------------------|------------------|----------------------------|-------------------|----------------------------|--------------------|----------------------------|--------------------|
| Year | No. | Year | No. | Year | No. | Year | No. | Year | No. |
| 1987 | 2 | 1992 | 6 | 1997 | 10 | 2002 | 23 | 2007 | 13 |
| 1988 | 4 | 1993 | 5 | 1998 | 16 | 2003 | 16 | 2008 | 28 |
| 1989 | 3 | 1994 | 8 | 1999 | 17 | 2004 | 19 | 2009 | 27 |
| 1990 | 4 | 1995 | 12 | 2000 | 14 | 2005 | 20 | 2010 | 20 |
| 1991 | 7 | 1996 | 13 | 2001 | 15 | 2006 | 23 | 2011 | 34 |
| <i>Total</i> | <i>20</i> | <i>Total</i> | <i>44 (120%)</i> | <i>Total</i> | <i>72 (63.6%)</i> | <i>Total</i> | <i>101 (40.3%)</i> | <i>Total</i> | <i>122 (20.8%)</i> |

The number of NGRI findings

Table 1 above gives the annual number of findings of NGRI for the last five years of the operation of the original [1964 Act](#), the first five years, the second five years and the third and fourth five years of the [1991 Act](#). The figures in brackets give the percentage increase in NGRI findings for each five year period of the [1991 Act](#). Although the picture is of a gradual but steady rise in the number of NGRI verdicts it is noticeable that the overall percentage increase in NGRI findings has been in decline. Thus, in the fourth five years there was an annual average of 24.4 NGRI verdicts giving a 20.8 per cent increase compared with an average of 20.2 (40.3 per cent increase), 14.4 (63.6 per cent increase) and 8.8 (120 per cent increase) verdicts in the third, second and first five year periods respectively. This compares to an average of 4 from 1987–1991 (and 3.6 in the previous 5 years from 1982–1986, n=18) with an overall total for the first 20 years of the [1991 Act of 359](#), giving an annual average of 17.95 NGRI verdicts.

Table 2 below gives the annual number of NGRI verdicts for the research period for this study, namely 2002–2011. The total of NGRI verdicts during this period was 223, giving an annual average of 22.3. In essence, therefore, the annual average [*Crim. L.R. 948](#) number of NGRI verdicts has now reached over 20 for the first time, with the total for 2011 having exceeded 30, also for the first time.

Table 2 — NGRI Verdicts 2002–2011

| | Frequency | Per cent | Cumulative Per cent |
|------|-----------|----------|---------------------|
| 2002 | 23 | 10.3 | 10.3 |

| | | | |
|-------|-----|-------|-------|
| 2003 | 16 | 7.2 | 17.5 |
| 2004 | 19 | 8.5 | 26.0 |
| 2005 | 20 | 9.0 | 35.0 |
| 2006 | 23 | 10.3 | 45.3 |
| 2007 | 13 | 5.8 | 51.1 |
| 2008 | 28 | 12.6 | 63.7 |
| 2009 | 27 | 12.1 | 75.8 |
| 2010 | 20 | 9.0 | 84.8 |
| 2011 | 34 | 15.2 | 100.0 |
| Total | 223 | 100.0 | |

Some demographic data

With regard to sex and age distribution, Table 3 shows that the vast majority of those found NGRI continue to be males at 91.5 per cent (n=203), compared to only 8.5 per cent for females (n=19). The mean age at the time of the offence was 35.3 (range 15–74), with males having a mean age of 35.2, whilst females had a higher mean age of 37. The most prevalent age range for males is 20–29 (n=69) and for females 30–39 and 40–49 (n=6 for both groups) with the vast majority of those found NGRI falling within the age ranges of 20–29 or 30–39 (n=145, 65 per cent). ⁶

Table 3 — Sex/Age Distribution

| | | sex of accused | | | Total |
|----------------------|----------|----------------|---------------|-----|--------------------|
| | | Male | Female | | |
| Age range of accused | up to 15 | 1 | 0 | 1 | |
| | 15–19 | 9 | 0 | 9 | |
| | 20–29 | 69 | 5 | 74 | |
| | 30–39 | 66 | 6 | 72 | |
| | 40–49 | 30 | 6 | 36 | |
| | 50–59 | 22 | 2 | 24 | |
| | 60–69 | 6 | 0 | 6 | |
| | 70–79 | 1 | 0 | 1 | |
| Total | | 204 | 19 | 223 | *Crim. L.R. 949 |

The offences charged

Tables 4 gives the main offence charged which in each case led to a verdict of NGRI. It can be seen from this that there was a wide spread of offences, the most prevalent of which are GBH (n=46, 20.6 per cent) and attempted murder (n=39, 17.5 per cent). Once again, however, what is apparent is the very small number of murder charges: in the 1997–2001 study the number of such charges was 7 (9.7 per cent), and this has now fallen to only 4 (1.8 per cent).

Table 4 — Offences

| | Frequency | Per cent | Cumulative Per cent |
|--|-----------|----------|---------------------|
| Murder | 4 | 1.8 | 1.8 |
| Attempted murder | 39 | 17.5 | 19.3 |
| Manslaughter | 1 | .4 | 19.7 |
| GBH | 46 | 20.6 | 40.4 |
| ABH | 28 | 12.6 | 52.9 |
| Arson | 29 | 13.0 | 65.9 |
| Criminal damage | 5 | 2.2 | 68.2 |
| Robbery | 9 | 4.0 | 72.2 |
| Burglary | 8 | 3.6 | 75.8 |
| Indecent/sexual assault | 15 | 6.7 | 82.5 |
| Threats to kill | 2 | .9 | 83.4 |
| Kidnap/child abduction | 3 | 1.3 | 84.8 |
| (Death by)dangerous driving | 7 | 3.1 | 87.9 |
| Possession/importation/supply of drugs | 1 | .4 | 88.3 |
| Endangering aircraft | 1 | .4 | 88.8 |
| Breach restraining order | 1 | .4 | 89.2 |
| Affray | 8 | 3.6 | 92.8 |
| False imprisonment | 2 | .9 | 93.7 |
| Having article with blade | 2 | .9 | 94.6 |
| Theft | 1 | .4 | 95.1 |
| Racially aggravated assault | 2 | .9 | 96.0 |
| Bomb hoax | 1 | .4 | 96.4 |

| | | | |
|------------------------------------|-----|--------------------------|-------|
| Child cruelty | 1 | .4 | 96.9 |
| Possession offensive weapon | 2 | .9 | 97.8 |
| Indecent exposure | 2 | .9 | 98.7 |
| Aid/abet reckless driving | 1 | .4 | 99.1 |
| Blackmail | 1 | .4 | 99.6 |
| Breach anti-social behaviour order | 1 | .4 | 100.0 |
| Total | 223 | 100.0 *Crim. L.R. 950 | |

As in previous studies offences against the person (including robbery, kidnap/child abduction, false imprisonment and child cruelty) remain the most common type of offences with a total of 130 (58.3 per cent) non-fatal and only 5 (2.2 per cent) fatal offences. Overall there has been an increase in GBH and ABH combined from 27.8 to 33.2 per cent when compared to the five year period 1997–2001 with a reduction in attempted murder from 22.2 per cent to 17.5 per cent

The disposals

Previous studies of the insanity defence revealed that community based disposals formed slightly over 50 per cent of all the disposals. In the 1997–2001 study the figure was 52.8 per cent, although if the 7 mandatory disposals given in relation to the murder charges are ignored this total rose to 58.5 per cent. Table 5 below gives the disposals for the current study. It can be seen from this that the number of hospital orders with and without restrictions was 108 (48.4 per cent) which is similar to the total for the 1997–2001 study which was 47.2 per cent. However, the percentage of restriction orders has fallen from 37.5 to 28.7 per cent with a marked increase in those without restrictions from 9.7 to 19.7 per cent. It is also clear that community based disposals continue to be well utilised, accounting for 51.2 per cent (n=112) of all disposals (ignoring the single case where the jury could not reach a verdict after insanity was pleaded and the defendant was discharged). Although the percentage of supervision (and treatment) orders has fallen from 41.7 to 36.8 per cent, absolute discharges have risen from 9.7 to 13.5 per cent (n=30). Overall, therefore, this figure of 51.2 per cent is similar to that in the 1997–2001 study of 52.8 per cent community disposals.

As in previous studies community based disposals continue to be given for serious offences including one case of murder (for the first time), attempted murder (n=9), GBH (n=16), arson (n=14) and robbery (n=8).

Table 5 — Disposals

| | Frequency | Per cent | Cumulative Per cent |
|---|-----------|----------|---------------------|
| Restriction order without limit of time | 64 | 28.7 | 28.7 |
| Hospital order | 44 | 19.7 | 48.4 |
| Guardianship order | 2 | .9 | 49.3 |
| Supervision (& treatment) order - 2 years | 63 | 28.3 | 77.6 |
| Supervision (& treatment) order - under 2 years | 19 | 8.5 | 86.1 |
| Absolute discharge | 30 | 13.5 | 99.6 |

| | | | |
|--------------------------------|-----|-------|-------|
| Defendant discharged-hung jury | 1 | .4 | 100.0 |
| Total | 223 | 100.0 | |

The Effect of the Domestic Violence, Crime and Victims Act 2004

The 2004 Act was implemented on March 31, 2005. The Act reduced NGRI disposals to three, namely: *Crim. L.R. 951

- (1) a hospital order (with or without a restriction order)⁷;
- (2) a supervision order;
- (3) an order for an absolute discharge.

With regard to the present study which spans a period of 10 years, 39 (32.5 per cent) months of the research period were prior to the implementation of the 2004 Act and 81 (67.5 per cent) months post implementation.⁸

The following tables give a split of these two respective periods in order to show something of the impact of the 2004 disposal regime. Table 6 below shows the numbers of NGRI cases involved pre and post the 2004 Act. It can be seen from this that 157 (70.4 per cent) of the NGRI cases fell to be dealt with under the 2004 Act, compared to 66 (29.6 per cent) dealt with before the Act.

Table 6 — Year of Decision

| Domestic Violence Act | | Frequency | Per cent | Cumulative Per cent |
|-----------------------|-------|-----------|----------|---------------------|
| Pre- 2004 Act | 2002 | 23 | 34.8 | 34.8 |
| | 2003 | 16 | 24.2 | 59.1 |
| | 2004 | 19 | 28.8 | 87.9 |
| | 2005 | 8 | 12.1 | 100.0 |
| | Total | 66 | 100.0 | |
| Post- 2004 Act | 2005 | 12 | 7.6 | 7.6 |
| | 2006 | 23 | 14.6 | 22.3 |
| | 2007 | 13 | 8.3 | 30.6 |
| | 2008 | 28 | 17.8 | 48.4 |
| | 2009 | 27 | 17.2 | 65.6 |
| | 2010 | 20 | 12.7 | 78.3 |
| | 2011 | 34 | 21.7 | 100.0 |
| | Total | 157 | 100.0 | |

Table 7 below gives a breakdown of the main offences charged in the periods before and after the enactment of the 2004 Act. It can be seen from this that the pattern of offences has remained fairly consistent. However, the percentage of cases of attempted murder has fallen in the post- 2004 Act period by around a third while cases of GBH have risen from 12.1 to 24.2 per cent.

Table 7 — Main Offence Charged

| Domestic Violence Act | | Frequency | Per cent | Cumulative Per cent |
|------------------------------|--|------------------|-----------------|----------------------------|
| Pre- 2004 Act | Murder | 2 | 3.0 | 3.0 *Crim. L.R. 952 |
| | Attempted murder | 15 | 22.7 | 25.8 |
| | GBH | 8 | 12.1 | 37.9 |
| | ABH | 6 | 9.1 | 47.0 |
| | Arson | 10 | 15.2 | 62.1 |
| | Criminal damage | 1 | 1.5 | 63.6 |
| | Robbery | 2 | 3.0 | 66.7 |
| | Burglary | 5 | 7.6 | 74.2 |
| | Indecent/sexual assault | 2 | 3.0 | 77.3 |
| | Threats to kill | 1 | 1.5 | 78.8 |
| | Kidnap/child abduction | 1 | 1.5 | 80.3 |
| | (Death by) dangerous driving | 2 | 3.0 | 83.3 |
| | Possession/importation/supply of drugs | 1 | 1.5 | 84.8 |
| | Affray | 3 | 4.5 | 89.4 |
| | False imprisonment | 1 | 1.5 | 90.9 |
| | Theft | 1 | 1.5 | 92.4 |
| | Racially aggravated assault | 2 | 3.0 | 95.5 |
| | Bomb hoax | 1 | 1.5 | 97.0 |
| | Aid/abet reckless driving | 1 | 1.5 | 98.5 |
| | Blackmail | 1 | 1.5 | 100.0 |
| | Total | 66 | 100.0 | |
| Post- 2004 Act | Murder | 2 | 1.3 | 1.3 |
| | Attempted murder | 24 | 15.3 | 16.6 |
| | Manslaughter | 1 | .6 | 17.2 |
| | GBH | 38 | 24.2 | 41.4 |
| | ABH | 22 | 14.0 | 55.4 |
| | Arson | 19 | 12.1 | 67.5 |
| | Criminal damage | 4 | 2.5 | 70.1 |
| | Robbery | 7 | 4.5 | 74.5 |
| | Burglary | 3 | 1.9 | 76.4 |
| | Indecent/sexual assault | 13 | 8.3 | 84.7 |
| | Threats to kill | 1 | .6 | 85.4 |
| | Kidnap/child abduction | 2 | 1.3 | 86.6 |
| | (Death by) dangerous driving | 5 | 3.2 | 89.8 |

| | | | | |
|--|-----------------------------|-----|-------|----------------------|
| | Endangering aircraft | 1 | .6 | 90.4 *Crim. L.R. 953 |
| | Breach restraining order | 1 | .6 | 91.1 |
| | Affray | 5 | 3.2 | 94.3 |
| | False imprisonment | 1 | .6 | 94.9 |
| | Having article with blade | 2 | 1.3 | 96.2 |
| | Child cruelty | 1 | .6 | 96.8 |
| | Possession offensive weapon | 2 | 1.3 | 98.1 |
| | Indecent exposure | 2 | 1.3 | 99.4 |
| | Breach ASBO | 1 | .6 | 100.0 |
| | Total | 157 | 100.0 | |

Table 8 below gives the disposals for the two periods. What is of particular note is that although the percentage of restriction orders has fallen, there has been an increase in the use of hospital orders from 10.6 per cent in the pre- 2004 Act list to 23.6 per cent in the post- 2004 Act list. Indeed, overall the percentage of hospital based disposals has risen from 43.9 per cent under the pre- 2004 Act period to 50.3 per cent under the post- 2004 Act period, while the overall percentage of supervision (and treatment) orders has fallen from 40.9 per cent (43.9 per cent if guardianship orders are included) to 35.1 per cent with the percentage of absolute discharges remaining fairly constant.

Table 8 — Disposals

| Domestic Violence Act | | Frequency | Per cent | Cumulative Per cent |
|-----------------------|---|-----------|----------|----------------------|
| Pre- 2004 Act | Restriction order without limit of time | 22 | 33.3 | 33.3 |
| | Hospital order | 7 | 10.6 | 43.9 |
| | Guardianship order | 2 | 3.0 | 47.0 |
| | Supervision (& treatment) order —2 years | 21 | 31.8 | 78.8 |
| | Supervision (& treatment) order—under 2 years | 6 | 9.1 | 87.9 |
| | Absolute discharge | 8 | 12.1 | 100.0 |
| | Total | 66 | 100.0 | |
| Post- 2004 Act | Restriction order without limit of time | 42 | 26.8 | 26.8 |
| | Hospital order | 37 | 23.6 | 50.3 |
| | Supervision (& treatment) order - 2 years | 42 | 26.8 | 77.1 *Crim. L.R. 954 |
| | Supervision (& treatment) order - under 2 years | 13 | 8.3 | 85.4 |
| | Absolute discharge | 22 | 14.0 | 99.4 |
| | Defendant discharged-hung jury | 1 | .6 | 100.0 |
| | Total | 157 | 100.0 | |

Concluding remarks

As in my earlier studies the number of verdicts of NGRI has continued to rise. The increase from a maximum of 17 findings in 1999 to a peak of 34 verdicts in 2011 certainly suggests that the legislative changes contained in the [1991](#) and [2004 Acts](#) are having an ongoing effect. Overall, during the 10 year research period hospital based disposals have become marginally more prevalent, 108 (48.4 per cent) than the overall percentage for the 1997–2001 study which was 47.2 per cent. However, although community based disposals accounted for 51.2 per cent (n=112) of NGRI cases which is broadly similar to that in the 1997–2001 study of 52.8 per cent, absolute discharges have risen from 9.7 to 13.5 per cent (n=30).

With regard to the possible impact of the [Domestic Violence, Crime and Victims Act 2004](#), what is of note is a reduction in the percentage of post-2004 Act non-hospital disposals from 56.1 to 49.1 per cent post-2004 Act. Overall, therefore, the percentage of hospital based disposals has risen from 43.9 per cent under the pre-2004 Act period to 50.3 per cent under the post-2004 Act period.

Finally, although there has been this gradual increase in the number of NGRI verdicts it remains the case, as the Law Commission emphasises in its Scoping Paper, that the number of such verdicts remains "surprisingly low".⁹ Furthermore, this gradual increase in numbers needs to be tempered with the fact that, as Table 1 reveals, the overall percentage increase in successive five year periods has slowed down and now stands at a mere 20.8 per cent for the five year period 2007–2011. This may mean that any increase in NGRI verdicts is levelling out and that a further increase in numbers, if any, will be modest.¹⁰ In short, until a new test for the insanity defence is implemented it seems more than likely that the number of NGRI verdicts will remain very low. In that connection, the current work of the Law Commission is of real importance as it could at long last signal the end of the M'Naghten Rules together with the introduction of a defence which is more appropriate for the 21st century.

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Footnotes

¹ R.D. Mackay, *The Insanity Defence — Data on Verdicts of Not Guilty by Reason of Insanity from 2002 to 2011, Appendix E of Insanity and Automatism, Supplementary Material to the Scoping Paper*, July 18, 2012.

² See R.D. Mackay "Fact and Fiction about the Insanity Defence" [1990] Crim. L.R. 247.

³ R.D. Mackay and G. Kearns "More Fact(s) about the Insanity Defence" [1999] Crim. L.R. 714, 725; R.D. Mackay, B.J. Mitchell and L. Howe "Yet More Facts about the Insanity Defence" [2006] Crim. L.R. 399, 410.

⁴ See Ministry of Justice Offender Management Caseload Statistics 2011 annual tables at Table A6.5. It should also be noted that the Ministry of Justice figures are based on the date of the hospital warrants rather than the date of the finding. This may have led to minor inconsistency in relation to the actual number of annual findings. Thus, the total number of NGRI verdicts which resulted in hospital orders with restrictions recorded by the Ministry of Justice in the above Table for the 10 year period 2002–2011 is 68 while the number contained in this study for the same ten years is 64, see Table 5 below.

⁵ I would like to acknowledge my gratitude to all the agencies and personnel involved for the generous assistance I received from them in carrying out this research.

⁶ It should be emphasised that in this study information was unavailable on criminal records, psychiatric history or psychiatric diagnoses. For data relating to these issues see fn.4 above.

⁷ The hospital order is now identical to one made under the [Mental Health Act 1983](#) and where the accused is charged with murder and the court has the power to make such an order, it must impose restrictions.

⁸ Only those defendants arraigned on or after March 31, 2005 are subject to the new disposal regime. See [Hussein \[2005\] EWCA Crim 3556](#) at [14]: "The fact that the appellant was committed or sent to the Crown

Court long before 31st March 2005 is nothing to the point." Although this decision deals with a case of unfitness to plead, Sch.12 para.8(2)(b) of the 2004 Act makes it clear that the same is true for the insanity defence.

9 *Law Commission, Insanity and Automatism — A Scoping Paper (July 18, 2012), para.1.48.*

10 I am continuing to monitor the number of NGRI verdicts and it will be interesting to discover whether my prediction is correct.