More fact(s) about the insanity defence

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Crim. L.R. 714 In "Fact and Fiction about the Insanity Defence", [1] a study of the operation of the defence of insanity, it was revealed that there was a total of 49 special verdicts of "not guilty by reason of insanity" (NGRI) in England and Wales during the period 1975 to 1988. The maximum number of such verdicts in any single year was six, while the smallest number was one. There were 38 males (78%) and 11 females. As regards criminal records, 24 of the males (63%) compared to only two females (18%) had previous convictions. In addition, the same number of males, namely 24, had a history of psychiatric treatment compared to eight of the females. The types of charge, which led to an insanity defence, were predominantly fatal and non-fatal offences against the person (84%, n=41) and the diagnostic group which was most frequent was schizophrenia (51%, n=25).

Although one of the study's conclusions was that the insanity defence was being used a little more often than had been thought, it was nonetheless clear that a major reason for the paucity of such cases was fear of the inflexible disposal consequences mandated by the Criminal Procedure (Insanity) Act 1964, namely, indefinite and indeterminate hospitalisation. That mandatory disposal, which also applied in cases of unfitness to plead, was eventually swept away by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, which introduced flexibility of disposal for both insanity and unfitness to plead. Briefly, this meant that in addition to the indefinite hospitalisation under the 1964 Act, the court was given the discretion (except where the charge is murder) to order admission to hospital without the equivalent of restrictions; or to make a guardianship order under the Mental Health Act 1983, or a supervision and treatment order, or an order for an absolute discharge of the accused. The availability of such flexibility led the Law Commission to predict that this would "undoubtedly give [the special verdict] greater practical importance than the insanity defence now has". [2] In this context it was reported in ***Crim. L.R. 715*** 1995 that ongoing research into the 1991 Act showed that during the first year of the Act's operation in 1992, the number of special verdicts of NGRI was six. [3] Although there had been no increase in the number of such verdicts, what was noteworthy was the fact that the courts were beginning to make full use of their newly acquired flexible disposal powers. As a result it was concluded:

"If this practice continues then it seems likely that the number of insanity defences will increase as lawyers and psychiatrists become more familiar with the operation of the 1991 Act." [4]

Research into the first five years of the operation of the 1991 Act has now been completed. [5] The primary source of information used was the relevant court and post trial files. The fact that all insanity cases no longer automatically attract the equivalent of a hospital order with restrictions posed a major data collection problem. The Statistics of Mentally Disordered Offenders do give the number of insanity defences annually but only in relation to restricted patients. [6] No official statistics are kept on the use of the insanity defence where other disposals are used. These cases were tracked through the kind co-operation of the Home Office Statistical Service, The Home Office Mental Health Unit, and the Court Service, which is an executive agency of the Lord Chancellor's Department. [7] What follows is a brief analysis of the results of that study as it relates to the insanity defence. [8] Would the new disposal powers impact on the number of NGRI findings, and if so, with what effects?

The Research Findings

As can be seen from Table 1 below a finding of not guilty by reason of insanity (NGRI) has remained a relatively infrequent occurrence. However, in the latter ***Crim. L.R. 716*** years of the five-year research period the number of findings began to rise, although not as rapidly as might have been anticipated. In order to put the increase into perspective Table 1 compares the annual number of successful insanity defences in the last five years of the Criminal Procedure (Insanity) Act 1964 with the five years of the research period.

Table 1--The Insanity Findings by Year

(1a) 1964 Act		(1b) 1991 Act	
Year	**Number**	**Year**	**Number**
1987	2	1992	6
1988	4	1993	5
1989	3	1994	8

1990	4	1995	12
1991	7	1996	13
Total	20	Total	44

The table shows that in the first five years of the 1991 Act there was an average of 8.8 findings of NGRI compared to an average of four (1987-1991). In the previous five years (1982-1986) the average number of findings was 3.6 when there was a total of 18 NGRIs. Indeed, the number of cases in the first five years of the 1991 Act is identical to the total in the 12 years prior to the 1991 Act. The rise in findings of NGRI is most marked in 1995 and 1996 when the numbers reached 12 and 13 respectively.

It is difficult to be completely confident about any particular reason for the increase. However, it seems likely that the new legislation has started to become more widely known by lawyers and psychiatrists as it has permeated the body of medico-legal knowledge. This in turn may have led to an appreciation that the 1991 Act has removed the more glaring disincentives inherent within the 1964 Act of running a defence of NGRI.

When it came to diagnostic groups, the picture was similar to the 1964 Act, [9] with schizophrenia dominating. The diagnoses at the time of the commission of the offences are presented in Table 2.

***Crim. L.R. 717** **Table 2--Diagnostic Groups**

Primary Diagnosis	Numbers	Percent
Schizophrenia (& associated10)	23	52.3%
Acute/Transient psychosis	5	11.4%
Hypomania	4	9.1%
Depressive/Anxiety Disorders	3	6.8%
Epilepsy/Post Ictal State11	3	6.8%
Sleepwalking	2	4.5%
Drug Induced Psychosis	2	4.5%
Brain Damage	1	2.3%
Post Traumatic Stress Disorder	1	2.3%
Total	44	

With regard to sex and age, unsurprisingly males constituted the vast majority of defendants with 36 (81.8%) males compared to eight (18.2%) females. The mean age for defendants at the time of the alleged offence was 31.9 [10] (range 17-54). Males had a slightly higher mean age of 32.5 compared to 29.4 for females.

Table 3 gives a breakdown of sex/age distribution.

Table 3--Sex/Age Distribution

Age Group	Male	Female
15-19	2	1
20-29	15	4
30-39	10	2
40-49	6	-
50-59	3	1
Totals	36	8

The ethnic breakdown is presented in Table 4 and shows that nearly three quarters of the sample were White-British. Only six (13.6%) of the sample were born outside the United Kingdom with Black African and Other accounting for all of these.

***Crim. L.R. 718** **Table 4--Ethnicity**

Ethnicity	Number	Percent13
White British	32	72.7%
Black British-Afro Caribbean	6	13.6%
Black African	3	6.8%
Other	3	6.8%14
Total	44	

With regard to criminal records exactly 50 per cent (n=22) of the sample had previous convictions with the same number having had previous psychiatric treatment in hospital.

A breakdown of the offences for which a verdict of NGRI was returned is presented in Table 5.

Table 5--Main Offences Charged

Main Offence	Number	Percent
GBH15	13	29.5%
Attempted Murder	5	11.4%
ABH	5	11.4%
Murder	4	9.1%
Burglary/Attempted Burglary	3	6.8%
Arson	3	6.8%
Causing Death by Dangerous Driving	2	4.5%
Robbery/Attempted Robbery	2	4.5%
Manslaughter	1	2.3%
Attempted Rape	1	2.3%
Criminal Damage	1	2.3%
Cruelty to a Child	1	2.3%
Affray	1	2.3%
Dangerous Driving	1	2.3%
Importing a Class A Drug	1	2.3%
Total	44	

While the predominance of offences against the person is similar to that found under the 1964 Act, what is immediately apparent is the fall in the number of murder charges. Under the 1964 Act murder accounted for almost one third of the cases while under the 1991 Act this has dropped to a mere four cases (9.1%). It is ***Crim. L.R. 719** not hard to see why. The automatic restriction order is likely to continue to act as a major disincentive, with the result that defendants probably prefer to use diminished responsibility.

In an attempt to achieve a more systematic analysis, the offences were deconstructed in order to provide four typologies of offending. These are presented in Table 6. These typologies are of course not mutually exclusive, as some of the offences in practice did contain more than one major element.

Table 6--Typologies of Offending

Typologies	Number
Directed Violence Against Person (DVP)	34
Non-Directed Violence Against Person (NDVP)	5
Directed Violence Against Property (DVPR)	6
Non-Directed Violence Against Property (NDVPR)	3
Other	6

The most striking aspect of the offences was that in 34 of the cases a major constituent was purposeful violence against the person (DVP). This rises to 38 cases when directed violence against property (DVPR) is added (two cases contained major elements of both). It is clear therefore that the typical NGRI verdict addresses itself to matters relating to purposeful violence against the person, property, or both.

The Insanity Trial

Research into cases under the 1964 Act was not able to shed light on any aspects of the actual trial. However, the current study permitted access to the court files with the result that we were able to gain some limited but significant information about the role of juries. The information in question related to the narrative of the court proceedings and was available in most cases from the court logs or from counsels' post-trial summaries. The main findings are given in Table 7.

Table 7--Role of the Jury

Role of Jury16	Number
No Jury Sworn	8
Jury Directed/No Dispute Between Parties	23
Normal Jury Deliberation	5
No Information/Uncertain	8
Total	44

***Crim. L.R. 720** It can be seen that in eight trials no jury was in fact empanelled and a formal verdict of NGRI was entered, after the defendants were permitted to enter pleas of NGRI. This matter received judicial attention in two cases. In a transcript of the first ruling in 1992 as to whether such a procedure was legally permissible a High Court Judge concluded:

"It seems to me that in 1991, when the most recent statutory legislation was enacted, it simply cannot have been the intention of Parliament that a jury must be empanelled on every occasion, even where an accused properly represented by leading and junior counsel, who have the benefit of medical evidence, have come to the conclusion that the proper plea for him to enter is that which this defendant wishes to enter in the present case, and the Prosecution, having themselves had the benefit of considering the situation consider that such a plea is an appropriate one for him to enter, I cannot believe that it was Parliament's intention that the court should be burdened with the clumsy procedure, where there is no issue to try, of requiring that a jury be empanelled to return what is essentially a formal verdict." [11]

Such an approach, however, seems quite contrary to the wording of the 1991 Act, which specifically states in section 1(1):

1.--(1) A jury shall not return a special verdict under section 2 of the Trial of the Lunatics Act 1883 (acquittal on ground of insanity) except on the written or oral evidence of two or more registered medical practitioners at least one of whom is duly approved. [12]

Indeed the judge acknowledged in the same ruling, with respect to the jury that "there is nothing in **any** statute which suggests in terms that a verdict can be reached by any other means". [13] Further, in a subsequent decision of 1994 in the same Crown

Court by another High Court Judge, it was conceded that "there is a difficulty with the word 'verdict', which prima facie seems to refer to something which has been done by a jury". Despite this reservation the reasoning in the earlier ruling was followed and a plea of NGRI was accepted without any jury involvement.

Whatever the merits or otherwise of these particular rulings they entered the culture of this Crown Court as it accounted for four findings of NGRI, all of which were returned without the so-called "clumsy procedure" of a jury. Moreover, in the second case referred to above, the decision was essentially arrived at in the same court, but the case was then moved to another venue because of the possibility of adverse publicity (the defendant's name was withheld from the court listings). Therefore, this court essentially returned five findings of NGRI where no jury was empanelled. The effect of these cases had, in effect, been to introduce a new ***Crim. L.R. 721*** procedure formerly unknown to English law. In recommending that a defendant should be able to plead NGRI, the Butler Report made it clear that this could only be done by legislation when it commented "At present the defendant is allowed to plead guilty to manslaughter by reason of diminished responsibility, but not to set up an 'insanity' defence by plea." [14] While such a change in procedure may be desirable it was certainly open to question whether it could be achieved by judicial fiat rather than through the proper channel of legislation. Fortunately, the matter now seems to have been resolved by the Divisional Court in the recent case of *R. v. Maidstone Crown Court, ex p. London Borough of Harrow* [15] where the accused having been permitted to plead NGRI to an arson charge had then been made subject to a supervision and treatment order. In setting aside the order and remitting the case to be tried by a jury Mitchell J. said:

"Regardless of whether the prosecution challenges the claim, a plea of 'not guilty by reason of insanity' (providing the accused is fit to plead and be tried), must be followed by the trial of that issue by a jury … The court proceeded to 'disposal' rather than to the empanelling of a jury to try the questions raised by the plea … The judge had no jurisdiction to do what he did. Unless a jury had returned a special verdict of 'not guilty by reason of insanity' the judge had no jurisdiction to make any disposal order … a defendant who entered a plea of 'not guilty by reason of insanity' to a charge of arson has still to be tried by a jury". [16]

The issue of the proper role of the jury is further complicated by clear evidence that on 23 other occasions juries were either formally directed to return a verdict of NGRI or were presented (as fact finders) with a situation where all parties, clearly supported by expert evidence, agreed beforehand that the case was one of NGRI. [17]

If we omit the cases where the information was unavailable we can see that in less than one in seven trials did the jury have a real deliberative role, although perversely the only case where a majority verdict was returned was in one where the jury were formally directed.

Returning to the first judge's ruling it is central that he stressed the role of medical evidence. Given, as we have seen, that in a minimum of 31 cases the outcome was determined in pre-trial deliberations the primacy of psychiatric opinion in returning a special verdict is clear. In this context it is vital to remember that section 1(1) of the 1991 Act cited above formalises the role of psychiatric evidence and what is clear from the findings is that the weight of deliberation lies there. Accordingly, it is now time to assess the nature of this evidence within the context of the psychiatric reports.

*Crim. L.R. 722 The Psychiatric Reports and the M'Naghten Rules

An examination of the court file in each of the 44 cases resulted in a total of 91 psychiatric reports, all of which were fully transcribed. However, in order to avoid bias two reports from each case (N=88) were analysed in order to ascertain which limbs, if any, of the M'Naghten rules [18] were addressed within the reports. What follows is a breakdown of the ways in which the rules were used. [19]

In eight of the cases there was clear evidence of contradictory opinion between the psychiatrists as to whether a finding of NGRI was appropriate. This resulted in eight reports (one report in each of these eight cases) which concluded that the defendant was not M'Naghten insane at the time of the trial. In other cases a further five reports did not address the issue of insanity at all, whilst another 14 reports indicated that the defendant was insane at the time of the offence, but either offered no explanation of how this related to the M'Naghten rules or were ambiguous. The following is a typical example.

"There was a direct link between the instruction of the voices and the alleged offence. Consequently I would suggest that the court consider the special verdict of NGRI in this case."

It was found that in 23 reports (20 cases) psychiatrists made some reference to the fact that the defendant did not know the "nature and quality of the act". Six of these reports used this test exclusively. In seven reports, covering five cases which could be described as automatism/sleepwalking, no mention was made of any limbs of the M'Naghten rules (these are not included in those described as unexplained/ambiguous). It could of course be argued that in cases of automatism the nature and quality limb of M'Naghten is so clearly fulfilled that no elaboration is necessary.

Perhaps the most interesting finding is in the way that the "wrongness" limb of M'Naghten continues to be interpreted by psychiatrists. In previous research it was remarked that "the general impression gained from reading the documentation in these cases was that the wrongness issue was being treated in a liberal fashion by all concerned, rather than in the strict manner regularly depicted by legal commentators". [20] The strict manner referred to is that the defendant did not know that his action was legally wrong. [21] Within the current research sample it was found that in 25 reports (18 cases) the psychiatrists specifically used the term that the defendant did not know that his act was "wrong". However, it is safe to say the vast majority of these reports made no reference to knowledge of legal wrongness. Rather in most of the case reports the "wrongness" limb was interpreted widely to cover whether the defendant thought his/her actions were morally justified, and/or whether the actions were in perceived self-defence of themselves or others, in the sense of ***Crim. L.R. 723*** protecting their physical or spiritual well-being. [22] Indeed, when we include the reports which supported these arguments (but where the phrase contained in the M'Naghten rules "did not know that it was wrong" was not actually referred to) then we find that 35 reports (25 cases) utilised the "wrongness" limb in agreeing that the defendant was NGRI. In short, the overwhelming impression is that the question the majority of psychiatrists are addressing is: if the delusion that the defendant was experiencing at the time of the offence was in fact reality, then would the defendant's actions be morally justified?--rather than the narrow cognitive test of legal wrongness required by the M'Naghten rules. Typical examples of the manner in which the "wrongness" limb was utilised in psychiatric reports were as follows:

"Mr B was charged with murder. The report in question stated: 'He believed that he was acting under divine authority, which superseded the law of the land, and he did not know what he was doing was wrong. Indeed, he said that the law of the land was based on erroneous interpretation of scripture'.

Ms E was charged with murder. 'At one level she knew what she was doing and she knew that she was going to kill. At another level it could be argued that she did not know that she was killing an ordinary human being and she believed that she was killing a demon disguised as a human."'

It seems clear, therefore, that the "wrongness" limb continues to be preferred in psychiatric reports as indicated in the earlier research. In so doing, it may be argued that psychiatrists in many respects are adopting a common sense or folk psychology approach and that the courts by accepting this interpretation are, in reality, expanding the scope of the M'Naghten Rules.

The Disposals

A particularly important aspect of the 1991 Act was the newly introduced flexibility of disposal. A breakdown of the disposals is provided in Table 8.

Table 8--Disposals

Disposal	Number	Percent
Restriction Order Without Limit of Time	17	38.6%
Restriction Order for Five Years	1	2.3%
Hospital Admission Order	3	6.8%
Supervision and Treatment--Two Years	18	40.9%
Supervision and Treatment--Less than Two Years	3	6.8%
Absolute Discharge	2	4.5%
Total	44	

Crim. L.R. 724 Apart from guardianship which was not used it is clear that community-based disposals, which form slightly over 50 per cent (52.2%, N=23 cases) of the total, are being well utilised. Indeed, if the four mandatory disposals in relation to murder are ignored the percentage of community disposals rises to 57.5 per cent. What is also important to note is that these disposals were not used solely for minor offences. Table 9 shows that supervision and treatment orders were used for charges of attempted murder, grievous bodily harm and robbery while absolute discharges were considered appropriate for charges of attempted rape and affray.

Table 9 Disposal by Offence

Disposal-	Restriction Order without limit of time	Restriction Order with fixed period	Admission Order	Guardianship Order	Supervision and Treatment--Two Years	Supervision and Treatment--Less than Two Years	Absolute Discharge	Total
Offence-								
Murder	4							4
Attempted Murder	2		1		2			5
Manslaughter	1							1
G.B.H.	6		2		4	1		13
A.B.H.	1				3	1		5
Attempted Rape							1	1
Attempted Burglary	1				2			3
Arson	2	1						3
Criminal Damage					1			1
Importing Drugs					1			1
Robbery					1	1		2
Causing Death by Dangerous Driving					2			2
Cruelty to a Child					1			1
Affray							1	1
Dangerous Driving					1			1
Total	17	1	3		18	3	2	44

With regard to hospital orders, the most obvious consideration for the imposition of a hospital based disposal was the requirement for treatment. Indeed it was found that all the defendants (21 cases) who were disposed of this way were already in hospital at the time of the trial.

Where hospital admission was ordered it can be seen from Table 8 that the majority of these cases, 18 out of 21, had a restriction order imposed. If we again omit the four cases where the disposal was mandatory following a charge of murder, it can be observed that when a hospital order was made and the judge had flexibility *Crim. L.R. 725* as to disposal, in an overwhelming 82.4% (n=14) of cases a restriction order was imposed.

Conclusions

The results of this study of NGRI under the first five years of the 1991 Act seem to support the following conclusions.

1. The 1991 Act has resulted in an increase in the use of the insanity defence. Offences against the person continue to predominate but there has been a marked decrease in the number of cases of murder.

2. The most common diagnosis used to support a defence of insanity continues to be schizophrenia. The “wrongness limb” under the *M'Naghten rules* continues to be more regularly used in psychiatric reports than the “nature and quality” limb.

3. In the majority of cases the insanity defence is not disputed by the prosecution and the jury have no real deliberative role in the sense of being required to decide whether the accused was legally insane.

4. The majority of those found NGRI are not sent to hospital but receive community disposals, particularly supervision and treatment orders.

Discussion

Although the special verdict remains a relatively rare occurrence it does seem likely that as the legislative changes contained in the 1991 Act have become more widely known the number of findings of NGRI has slowly begun to rise. The introduction

of flexibility of disposal (except in murder cases) removed a central disincentive to seeking a verdict of NGRI and a striking finding during the research period was that community-based disposals were being fully utilised by the courts, with just over 50 per cent of defendants being subject to such disposals. This in turn strongly indicates that the insanity defence should no longer be regarded with suspicion and fear, as was so clearly the case under the 1964 Act. Rather, a plea of NGRI ought now to be viewed as a defence strategy in appropriate cases, which can often be of benefit to the accused by resulting in a community disposal. Once this is realised by the legal and the medical professions then there is every reason to believe that the number of special verdicts will increase as lawyers and psychiatrists become more familiar with the working of the 1991 Act. Research into NGRI under the 1964 Act showed that in practice English law had an insanity defence in name only; it is to be hoped that the continued impact of the 1991 Act may help to change that. [23]

Footnotes

1 R. D. Mackay, "Fact and Fiction about the Insanity Defence" [1990] Crim.L.R. 247 at 248.

2 Law Commission, "A Criminal Code for England and Wales" (Law Com. No. 177) (1989), Vol. 2, p. 221, para. 11.11.

3 R. D. Mackay, *Mental Condition Defences in the Criminal Law* (Oxford, Clarendon Press, 1995), pp.107-108 which updated the figure given in R. D. Mackay and G. Kearns, "The Continued Underuse of Unfitness to Plead and the Insanity Defence" [1994] Crim.L.R. 576, which when written stood at five NGRI verdicts.

4 Mackay, *ibid.,* p.107.

5 The research was funded by the Economic and Social Research Council.

6 See Statistics of Mentally Disordered Offenders in England and Wales 1997 (Home Office Statistical Bulletin--Issue 19/98) at Table 3. It should also be noted that the Home Office figures are based on the date of the hospital warrants rather than the date of the verdict.

7 We gratefully acknowledge the assistance we received throughout the research from these three agencies together with additional help from the Crown Prosecution Service.

8 A complementary article dealing with unfitness to plead during the first five years of the 1991 Act will follow.

9 See Mackay, "Fact and Fiction about the Insanity Defence" *op. cit.* p. 249 where 51 per cent of the sample of 49 NGRIs were schizophrenic.

10 All mean ages have been rounded to one decimal place.

11 This is taken verbatim from the transcript kindly supplied by the Crown Court in question.

12 See the recent decision of the Court of Appeal in *Attorney General's Reference (No. 3 of 1998)* [1999] 3 All E.R. 40 which makes it clear that in determining whether the accused "did the act or made the omission charged" for the purposes of s.2(1) of the 1883 Act, and assuming insanity, the Crown is only required to prove the ingredients which amounted to the *actus reus* of the crime, and is not required to prove the *mens rea* of the offence. For the more complex position in relation to unfitness to plead see R. D. Mackay and G. Kearns, "An upturn in unfitness to plead? Disability in relation to the trial under the 1991 Act" forthcoming.

13 Our emphasis.

14 Report of the Committee on Mentally Abnormal Offenders, Cmnd. 6244 (1975) at para. 18.50. See further "A Criminal Code for England and Wales" (Law Com No. 177), Vol. 1 at para. 11.30, where clause 37 of the Criminal Code Bill as proposed by the Law Commission endorses this proposal stating "A defendant may plead 'not guilty by reason of mental disorder"'.

15 *The Times,* May 14, 1999.

16 Lexis transcript.

17 We can surmise that no dissenting psychiatric opinion was presented in these cases.

18 (1843) 10 Cl. & F. 200, 210. The essential rules are: that "… 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 he was doing what was wrong".

19 It should be noted that the categories used are not mutually exclusive. For example, in a report a psychiatrist might make some reference the "nature and quality" limb but rely more heavily on the "wrongness" limb.

20 Mackay, R.D., "Fact and Fiction about the Insanity Defence" [1990] Crim.L.R. 247 at 251.

21 See *Windle* [1952] 2 Q.B. 826.

22 The factual scenarios in many of these cases involved religious delusions relating to the victim being possessed by the devil or concerning the need to save the world and are similar to the types of case found under the 1964 Act, see Mackay, "Fact and Fiction about the Insanity Defence" *op. cit.,* at 250.

23 We are continuing to monitor the operation of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 and will report on future developments in five yearly intervals.

