Insanity, automatism, and the burden of proof on the accused

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*L.Q.R. 475 I. INTRODUCTION

INSANITY is "the only matter of defence in which under the common law the burden of proof has been held to be completely shifted" [1] to the accused. Where an accused seeks to rely upon the defence of insanity a persuasive or legal burden of proof [2] is placed upon him or her to establish the defence on the balance of probabilities. The purpose of this article is to examine the "exceptional and incongruous position of the defence of insanity" [3] in the common law of evidence. This apparent anomaly is highlighted by the law pertaining to automatism. As is discussed in greater detail subsequently, if the involuntary actions were

those of a sane accused, the legal burden of proof rests on the prosecution in the usual fashion. But if the involuntary actions can more properly be attributed to the insanity of the accused, then the persuasive burden rests upon him or her. The fact of involuntariness is common to both cases, but the burden of proof is different. A number of questions fall to be addressed. Why is insanity treated in a different way to other common law defences, such as sane automatism, duress or self-defence, where the accused is required only to raise a reasonable doubt as to circumstances of exculpation? Are there persuasive reasons which can justify this separate approach? An important question of principle is whether there is a conflict between the fundamental human right of the presumption of innocence [4] and the requirement that the accused prove that he or she ***L.Q.R. 476*** is not guilty on the basis of insanity at the time of bringing about the *actus reus* of the offence.

A presumption of sanity?

It is common for courts to make reference to "the ordinary presumption that a man is sane".[5] This notion of a presumption of sanity has come to be a convenient way of expressing the fact that the accused bears the legal burden with respect to the defence of insanity; and it is used in this sense throughout this article. The presumption of sanity is more a rule of substantive law than a presumption, since it lacks the characteristic feature of a presumption: "it does not contemplate a process of inference from a premise of relevant fact to a conclusion of relevant law or fact". [6] On occasion, however, courts have lost sight of the true nature of the "presumption" of sanity and have appeared to conclude that it necessitates the placing of the legal burden with respect to insanity upon the accused. In *The King v. Brooks,* for example, Myers C.J. stated: "The Crown is not required to prove the sanity or criminal responsibility of … an accused person because the law presumes it. Insanity is a ground of defence, the proof of which lies upon the accused." [7] This conclusion is not a necessary one. A presumption of sanity need mean no more than that the accused bears the burden of introducing evidence of insanity. [8] As Healy has stated:

"The presumption of sanity is nothing but a rule of substantive law that excludes the mental health of the accused from the definition of liability, and from the issues in any particular case, unless and until evidence is adduced that specifically puts the criminal insanity into question … The so-called presumption of sanity is not different in this respect from a "presumption' against duress, self-defence, provocation or accident." [9]

There is nothing in the designation of a "presumption" of sanity to ***L.Q.R. 477*** lead one to the conclusion that the legal burden of proof should rest on the accused or that insanity should be treated in a way different to these other defences. [10] To say that there is a presumption of sanity "is another way of stating the effect of the rule rather than a justification for it". [11] The possible justifications remain to be examined.

An historical anomaly?

The orthodox explanation for the singular position of insanity is that, in the words of Glanville Williams: "The defence … is an anomalous exception, explicable only as a survival from a time before the present rules of burden of proof were established." [12] The origin of the modern law is, of course, the case of *Daniel M'Naghten,* where it was decreed "that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction". [13] This rule was laid down at a time when, as Sholl J. explained in *R. v. Bonnor,* "the distinction between the persuasive onus and the evidential onus … was … not so carefully marked by the courts", and "the common law … laid on a person accused of felony the onus in law … of proving, in order to exculpate himself … such matters as accident, self-defence, and provocation". [14] There was also a presumption that an accused intended the natural consequences of his or her acts unless the contrary could be proved. [15] It thus seems improbable that the judges in the *M'Naghten* case intended to lay down a special rule for insanity, but were merely applying to insanity what they understood to be a general rule. [16] Prior to the celebrated decision of the House of Lords ***L.Q.R. 478*** in *Woolmington v. D.P.P.* [17] the view was widely taken that the burden of proof in respect of all general defences rested upon the accused. [18] Thus in the sixth edition of *Best on Evidence,* published in 1875, one finds the following passage: "so, a party who is proved to have killed another, is presumed in the first instance to have done it maliciously, or at least unjustifiably; and, consequently, all circumstances of justification or extenuation are to be made out by the accused, unless they appear from the evidence against him". [19] This approach had a long pedigree and had been articulated in both Foster's *Crown Law* and Blackstone's *Commentaries.* Part of the explanation for this model of liability was that the criminal law had followed the pattern of the civil courts, which placed the burden of proving defences on the defendant. [20] Barry was no doubt accurate in his observation that "had the judges been

asked in 1843 where the burden lay of establishing circumstances of necessity or accident when a homicide was proved, they would have answered in similar words, that it must be clearly proved that at the time of committing the act the accused acted in self-defence or caused the death by accident". [21]

As is well known, in *Woolmington* it was established that the accused is protected by a presumption of innocence and that the onus is on the prosecution to prove the guilt of the accused beyond all reasonable doubt. Viscount Sankey L.C. discussed the major authorities which suggested that the onus was on the accused to prove certain matters and demonstrate his or her innocence. His conclusion was that these cases were concerned more with the nature of homicide and the elements necessary to be proved, rather than a consideration of the burden of proof. As Lord Diplock later recognised, however, "by far the greater strength of previous authority supported the view which the House rejected". [22] What Viscount Sankey did was to build upon those instances where "judges had in practice been applying the law with less strictness towards the defence than its terms warranted". [23] The principles derived from the decision in *Woolmington* are that "in a criminal case there is a single issue of guilt, the persuasive burden in respect of which should rest on the ***L.Q.R. 479*** prosecution" [24]; and "the accused should not carry the risk of nonpersuasion not only in regard to constituent elements of the crime, but … also in connection with any defensive issue which he raises". [25] What is interesting, however, is that insanity was recognised by Viscount Sankey as an exception to his general common law rule: "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to … the defence of insanity …". [26] The view seems to have been that insanity raised quite distinct issues and that the *M'Naghten* rule was too well established to be departed from. His Lordship stated:

"*M'Naughton's* case stands by itself. It is the famous pronouncement on the law bearing on the question of insanity in cases of murder. It is quite exceptional and has nothing to do with the present circumstances. In *M'Naughton's* case the onus is definitely and exceptionally placed upon the accused to establish such a defence … It is not necessary to refer to *M'Naughton's* case again in this judgment, for it has nothing to do with it". [27]

These observations are questionable. As previously suggested, it is doubtful that the judges in the *M'Naghten* case would have taken the view that they were "definitely and exceptionally" placing the burden of proof upon the accused, given that in 1843 accident (the issue in *Woolmington*) and other defences would have been treated in the same way. [28] Be that as it may, the *Woolmington* doctrine has not been extended to insanity, even though it has subsequently been applied to all other common law defences. There is, for example, no question but that the prosecution bears the burden of disproving beyond all reasonable doubt defences such as self-defence or provocation. [29] The courts have failed, in Fletcher's words, "to make the analogical leap from self-defence and provocation to insanity … The English courts have yet to perceive the inconsistency of imposing differential treatment on two defences--self-defense and insanity-- ***L.Q.R. 480*** that are both related to the defendant's culpability in violating the law". [30] Insanity remains apart from the mainstream. The apparent resilience of the rule assigning the burden of proving insanity to the accused might make one question whether it can so lightly be written off as an historical anomaly. Is there perhaps something about the defence which has persuaded courts to treat it in this distinctive fashion? What are the possible reasons for this, and are they still valid? It is indeed true that the *M'Naghten* case was decided at a time when "the modern law of evidence and the criminal law alike were at a rudimentary stage of development". [31] Questionable legal rules do sometimes take on a life of their own, but could a deviant rule of criminal law have persisted for so long?

II. PROVING INSANITY

It has on occasion been suggested that the *M'Naghten* case left unresolved the precise nature of the burden imposed on the accused who seeks to establish a defence of insanity. Evidence would of course have to be introduced by the accused in order to prove insanity. But was the accused's burden a persuasive one? It is true that pre-*Woolmington* courts do appear to have been "chary of going into too much detail on the question of how much evidence was required: that is, what exactly was the onus on the accused". [32] It is equally the case, however, that there was never much doubt that an accused bore the risk of non-persuasion in respect of insanity. In *R. v. Stokes,* a case which arose just five years after *R. v. M'Naghten,* Rolfe B. directed a jury in the following terms:

"If the prisoner seeks to excuse himself upon the plea of insanity, it is for him to make it clear that he was insane at the time of committing the offence charged. The onus rests on him; and the jury must be satisfied that he actually was insane. If the

matter be left in doubt, it will be their duty to convict; for every man must be presumed to be responsible for his acts till the contrary is clearly shown." [33]

This is not an evidential burden which is being described.

The only live issue seems to have been the *quantum* of the persuasive burden, there being some suggestions that the accused had to ***L.Q.R. 481*** prove insanity beyond a reasonable doubt. [34] The nature of the persuasive burden upon the accused has been clarified in subsequent cases. [35] It is clear that the burden of proving insanity imposed on the accused is not the same as the burden of proof which lies on the prosecution to establish guilt. Lord Diplock explained in *Public Prosecutor v. Yuvaraj* that "there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt". [36] The standard of proof required is that of a balance of probability, the standard in civil proceedings. What is required is "evidence satisfying the jury of the probability" [37] that the accused was insane at the time of committing the offence. And, as Sholl J. pointed out in *R. v. Carter,* "if the Crown proves all the other elements of the crime but the accused leaves the evidence in such a state that the jury is not satisfied of insanity on the balance of probabilities, even if doubtful about it, the accused must be convicted". [38] It would seem, therefore, that what a prosecutor must do to defeat a defence of insanity is introduce or point to sufficient evidence to leave the jury "in the condition of mind of being quite unable to answer" [39] the question of the accused's sanity or otherwise, since there would then be a duty to convict. The following observation to the contrary made by Watkins L.J. in *R. v. Dickie* is difficult to accept.

"If the defence decides to raise the issue, it has, if it is to succeed, by evidence to satisfy the jury on a balance of probabilities that at the time when the offence was committed the accused was insane. The prosecution may call evidence in rebuttal to disprove ***L.Q.R. 482*** that assertion and will succeed only if on the evidence there is no reasonable doubt that the accused is not insane". [40]

Equally misleading is the version which has been given in an Australian treatise: "Where the evidence called for the defence raises a prima facie case of insanity upon the balance of probability, the onus of rebutting it shifts to the prosecution but it is sufficient for the prosecution to prove upon the balance of probability that the accused person was not insane, because the onus on shifting does not change its character …". [41] Both these statements of law are wrong because the prosecution does not have to *prove* the sanity of the accused. It is not even necessary for the prosecution to prove the accused's sanity on the balance of probabilities: if the evidence is *in equilibrio* as to the accused's sanity, there can be no proof of his or her insanity. [42] It is axiomatic that the accused should prove insanity. The issue is simply whether the defence has satisfied the burden placed upon it.

There is considerable scope for confusion (and judicial error) in this area of law. In a trial where insanity is a live issue there are two different burdens: that of the prosecution to prove the elements of the offence beyond all reasonable doubt; and that of the accused to establish insanity on the balance of probabilities. Accepting that there is a "great distinction" [43] between the two burdens, there is no doubt an "easy opportunity for argument on the correctness of the trial judge's instructions" [44] when both burdens are at issue in the same case.

The necessity to draw the distinction between the two burdens to the attention of the jury has been stressed by appellate courts. The decision in *Mizzi v. The Queen* concerned a direction to a jury that the defendant had to prove insanity "to their satisfaction and that if he left them in doubt he failed to establish the defence of insanity". [45] The trial judge had emphasised the responsibility of the Crown to ***L.Q.R. 483*** prove the elements of the crime beyond all reasonable doubt. The High Court of Australia pointed out:

"No contrast was expressly instituted between the two standards. The jury were never told definitely that it was not necessary that the case for the prisoner should remove all reasonable doubt as to his insanity as the case of the Crown must do in proving the elements of the crime…. It seems unlikely that [the summing up] would make the jury thoroughly aware of the great distinction between very different burdens of proof resting upon the Crown and, in reference to the plea of insanity, upon the defence". [46]

The decision in *Mizzi* can be compared with an earlier Australian case, *Sodeman v. The King.* [47] The trial judge at no point drew a contrast between the burden which lay on the accused with that which lay on the Crown. In the High Court Dixon and

Evatt JJ. both took the view that the jury would not have understood from their directions that the accused bore a lighter burden than the Crown. The former's powerfully expressed conclusion was:

"I am quite unable to suppose that the jury would understand from the charge to them that the burden of proof upon the prisoner was of an altogether different degree to that which is imposed upon the Crown. The difference between the two opposing degrees of persuasion cannot be regarded as a matter of little or no importance. The daily experience of the administration of justice shows the powerful effect produced by the degree of certainty which the one demands. It also illustrates how a sensible preponderance of evidence usually suffices to turn the scale when the lower standard prevails". [48]

Latham C.J. and Starke J. took the opposite view as to the adequacy of the trial judge's directions on the issue. [49] The difficulty left unresolved by both these decisions is that a judge will be required to give the jury a complicated direction on the difference between the two burdens of proof. The Criminal Law Revision Committee referred to the view of several judges "that they find it difficult to direct juries on this in a way which the jury is likely to find satisfactory or even intelligible". [50]

L.Q.R. 484 **III. DISPROVING *MENS REA***

The import of the *M'Naghten* case for the burden of proof applicable to insanity was well summarised by Lord Reading C.J. in *R. v. Perry:*

"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must clearly be shown that at the time of committing the act the party is labouring under such a defect of reason as to not know the nature and quality of the act which he is committing … or … that he does not know that he is doing wrong". [51]

Thus conceived, the defence of insanity under the M'Naghten Rules takes two separate forms. The first is that applicable to an accused who lacked the mental capacity to understand the "nature and quality" of his or her conduct. In this form insanity appears to operate as a defence which negatives *mens rea.* The second form of insanity applies to an accused who was incapable of knowing that the conduct was wrong. Here insanity operates as a defence which can "negative criminal liability despite the presence of the definitional elements of an offence". [52]

The presumption of sanity as currently applied can lighten the prosecution's burden to prove the mental element in relation to this second form of insanity under the M'Naghten Rules. Absent the presumption of sanity, it could be harder for the prosecution to prove that the accused had, for example, the requisite intention to kill the victim. But it is the imposition of a burden of proof upon the accused to establish insanity of the first type which raises particular conceptual difficulties. Quite simply, how is it that the prosecution can be required to prove beyond reasonable doubt the presence of *mens rea,* while at the same time requiring the accused to prove (on the balance of probability) its absence? [53] It was this consideration which led Glanville Williams to the conclusion that there could at most be an evidential burden upon the accused who claims not to have known the nature and quality of his or her act:

"If there is a persuasive presumption of insanity, it operates only where the issue is whether the accused, being insane, knew that what he was doing was wrong; it cannot operate where the issue is whether the accused, being insane, knew the nature and qual ***L.Q.R. 485*** ity of his act, for on that issue a negative answer would negative *mens rea,* the burden of proving which is on the prosecution". [54]

There are two major difficulties with this argument. The first is that the relationship between *mens rea* and insanity is not as straightforward as has sometimes been suggested. [55] Wells has pointed out that "insanity does not necessarily negative *mens rea*":

"It does so if *mens rea* consists of a subjective mental element. Where it is an objective form of recklessness or negligence, or where there is a crime of strict liability, then the argument that it precludes *mens rea* breaks down". [56]

In general terms, therefore, as Rehnquist J. recognised in *Mullaney v. Wilbur,* "the presence or nonexistence of legal insanity bears no necessary relationship to the existence or nonexistence of the required mental elements of the crime". [57] It is in relation to crimes of intention or subjective recklessness that an insane delusion falling within the insanity defence will negate the *mens*

rea required by the definition of a particular offence. It is only if the notion of *mens rea* is used in the broad sense of a "general notion of moral blameworthiness" [58] that one will always be able to say that insanity nullifies an inference of *mens rea.* And if the concept of *mens rea* is defined with sufficient breadth, it can encompass both types of *M'Naghten* insanity. But, as Wells has further pointed out, "if one took the wider normative view of *mens rea,* then the argument would be somewhat tautologous; it would amount to saying that an insane person is not responsible because the stigmatised wrongful state of mind includes only the sane". [59]

A more serious difficulty is that the version of the law given by Glanville Williams is not the prevailing orthodoxy in the courts. [60] ***L.Q.R. 486*** (And judges have tended not to follow his model in drawing a distinction in this regard between the two types of insanity under the M'Naghten Rules. [61]) The present law is that if an accused seeks to assert that he or she lacks *mens rea* by reason of insanity, then the burden is upon him or her to prove this. Gresson P. explained in *R. v. Cottle*:

"It is for the Crown to prove the commission of the act alleged to be a crime, and to prove as well the guilty intent of the accused in all cases where intent is essential. But if the accused raises insanity as negativing intent, i.e. that disease of the mind made a sane intent impossible, he it is who must establish it". [62]

The proof of insanity by an accused is part of a two stage process, the elements of which are "quite distinct". [63] A jury will be told to presume that the accused was sane at the time of committing the offence. As Burt C.J. emphasised in *Perkins v. R.*: "If upon that footing they are not satisfied beyond reasonable doubt that he is guilty, then he is entitled to an unqualified verdict of not guilty and no question of his insanity then arises for the jury's determination." [64] The second stage is only reached if, sanity having been presumed (and the *actus reus* proved beyond reasonable doubt), the necessary inference of *mens rea* can be drawn. The question of the accused's insanity "only arises if the jury, assuming the accused to be of sound mind, would find him guilty and it is only when that stage has been reached that it is necessary to ask whether, on the balance of probabilities, the accused has established that he was insane". [65] If the accused cannot demonstrate this then, as noted by Woodhouse J. in *R. v. Roulston,* "the provisional presumption of sanity will not have been displaced, nor the consequential inference of capacity and intention". [66]

Thus described, insanity is indeed an exception to the *Woolmington* principle: an accused can be required to *disprove* the presence of *mens rea* where the defence of insanity is raised. It is the way in which courts apply their assumption of sanity through this two stage process which offers an explanation for "the apparent paradox that co-existent with the onus on the Crown to prove the criminal intent going with the actus reus the accused, relying on the insanity defence, must prove an incapacity to understand the nature and qual ***L.Q.R. 487*** ity of the same act". [67] If an accused has killed another person under the delusion that he or she was strangling a snake, then clearly he or she did not know the nature and quality of the act. [68] The obvious question to ask is how a jury could first conclude beyond reasonable doubt that the defendant intended to kill. Quite apart from the logical difficulty, does the presumption of sanity mean that the prosecution can succeed in its case without having to prove the intention to kill? This does indeed appear to be the case where insanity is raised as a defence. [69] The law presumes that an accused did know the nature and quality of the act.

Arguments pertaining to sanity are not treated in the same way as more convential claims which can negate *mens rea* (*e.g.* accident and mistake). The courts are alert to the requirements of social protection as well as those of individual responsibility. If strict logic is applied, it may well be that an accused who--as the result of an insane delusion--did not know the nature and quality of his or her act could argue in the general way that he or she lacked *mens rea.* In effect, the more insane an accused was at the time of the offence, the more likely an unconditional acquittal would be "and the less likely it would be that the defendant would be acquitted on the ground of mental illness". [70] O'Brien J. pointed out in *R. v.S.*:

"If the jury were required to take into account all the evidence, including that relating to insanity, in determining whether the prosecution had established its case beyond reasonable doubt, including the intention alleged as an element of the offence which is denied by the accused by reason of insanity, the first limb of the rule in *M'Naghten's* case disappears. It is absorbed into the case for the prosecution". [71]

The courts have sought to prevent the circumvention of the insanity defence (with its special burden of proof) and the disposal arrangements for those found not guilty by reason of insanity. [72] This ***L.Q.R. 488*** is why courts do not permit evidence

suggestive of insanity to be used in considering an argument of lack of *mens rea* independently of the insanity defence. [73] There would otherwise also exist "the possibility of using a bad case of insanity to make a good case of reasonable doubt". [74]

The account of the law presented in the preceding paragraphs does not answer the normative argument that the accused should bear no more than an evidential burden on the defence of insanity. It is important, however, to keep separate two matters which have too often been conflated [75]: the apparent inconsistency between the burden of proof on insanity with the general rule that the prosecution should prove *mens rea* (an argument which could only be compelling in respect of crimes of subjective *mens rea*); and the nature of the burden to be placed on the accused. This second issue remains crucial no matter how the precise relationship between insanity and *mens rea* is conceived. It is of equal significance for both types of insanity under the M'Naghten Rules. The matter is addressed subsequently in this article.

IV. PROVING INNOCENCE

A stronger line of reasoning against the imposition of a persuasive burden on the accused focuses upon the apparent conflict with the presumption of innocence. The argument runs as follows. Insanity precludes a finding of guilt. The current law functions in such a way as to allow the sanity of the accused to be presumed rather than his or her insanity disproved beyond a reasonable doubt by the prosecution. And since there is a persuasive onus on the accused to prove insanity (that is, "in effect to require him to establish his innocence" [76]) on the balance of probabilities, it is possible for there to be a conviction despite the presence of a reasonable doubt as to the guilt of the accused. Lamer C.J. explained in *R. v. Chaulk*: "If an accused cannot discharge the persuasive burden with respect to his insanity, the trier of fact may well be obliged to convict the accused despite the exis ***L.Q.R. 489*** tence of a reasonable doubt as to sanity, and therefore, as to guilt." [77] At issue in the *Chaulk* case was the apparent conflict between the presumption of innocence, guaranteed under section 11(*d*) of the *Canadian Charter of Rights and Freedoms,* and the presumption of sanity contained in the *Criminal Code.* [78] The majority of the Supreme Court did indeed conclude that "the presumption of sanity … violates the presumption of innocence". [79] Wilson J. stated:

"The presumption of sanity requires the accused to establish his or her insanity on a balance of probabilities and, however one conceives the plea of insanity, … the persuasive burden imposed on the accused … permits him or her to be convicted of a crime despite the existence of a reasonable doubt as to his or her guilt. This offends the presumption of innocence …." [80]

The logic of this argument appears to be compelling.

The minority in *Chaulk* were of the view that there was no conflict between the presumptions of innocence and sanity. Their view of the defence of insanity, as expressed by McLachlin J., was that it was a fundamental precondition of criminal responsibility and, "the question of sanity relates not to guilt or innocence, but to the more fundamental issue of whether the accused can fairly be held criminally responsible for his or her acts or omissions". [81] Insanity was characterised as a defence which "arises at a tangent to the basic principles of criminal liability". [82] The presumption of sanity was seen as "merely" relieving the prosecution from establishing that the accused had the capacity for choice which makes the attribution of criminal responsibility and penalties justifiable. The prosecution would still, so it was argued, have to prove the accused's guilt (the *actus reus, mens rea* and the absence of defences raised on the evidence) beyond a reasonable doubt. [83] There are two main difficulties with the minority's reasoning. The first is that there is a failure to meet directly the argument of the majority that, since only the sane can be found guilty, it is contrary to the presumption of innocence to require the accused to prove insanity. As Lamer C.J. emphasised: "Whether the ***L.Q.R. 490*** claim of insanity is characterised as a denial of *mens rea,* an excusing defence or, more generally, as an exemption based on criminal incapacity, the fact remains that sanity is essential for guilt." [84] If one accepts McLachlin J.'s account of insanity as a denial of the individual's capacity for choice, then should not the presumption of innocence require proof of that capacity beyond a reasonable doubt before there can be a finding of guilt? Lamer C.J. stressed: "If an accused is found to have been insane at the time of the offence, he will *not* be found guilty; thus the "fact' of insanity precludes a verdict of guilty." [85]

The second weakness in the minority's reasoning is its reliance upon the argument that there is no violation of the presumption of innocence because it is only after the prosecution has proved both *mens rea* and *actus reus* that the issue of insanity arises. This will not ordinarily be the case. As was described in the previous section, the effect of a plea of insanity can be to negate

mens rea in a particular case. The presumption of sanity can serve to relieve the prosecution of the normal duty to prove *mens rea.* The right analysis is that of Lamer C.J.:

"It is not correct … to state that the issue of insanity arises *only* after both *actus reus* and *mens rea* have been proved by the Crown. If the accused's insanity puts the existence of *mens rea* for the particular offence into question, it cannot be said that *mens rea* has been proved *before* the issue of insanity arises. The Crown cannot be said to have *proved* anything beyond a reasonable doubt until the end of the trial. … In cases where a claim of insanity is manifested as a denial of the requisite *mens rea,* it cannot be said that *mens rea* has been established until *after* the insanity claim has been raised and failed". [86]

Be that as it may, similar arguments to those of the minority in the *Chaulk* case seem to have persuaded the European Commission of Human Rights that the imposition of a persuasive burden in respect of insanity does not conflict with the presumption of innocence in the European Convention. The Commission found inadmissible an application which complained that the burden on the accused in criminal proceedings to prove insanity on the balance of probabilities was contrary to the presumption of innocence in Article 6, paragraph 2. [87] The Commission noted that the law of which complaint was made does "not concern the presumption of innocence, as such, but the presumption of sanity". [88] It did "not consider that requiring the ***L.Q.R. 491*** defence to present evidence concerning the accused's mental health at the time of the alleged offence, constitutes … an infringement of the presumption of innocence". [89] The Commission observed "that in English law the burden of proof remains with the prosecution to prove beyond reasonable doubt that the accused did the act or made the omission charged". [90] It has to be said that this decision is both superficial and unconvincing. It quite misses the point to cite a requirement that the accused put forward evidence of his insanity. If this were so there would be no objection to the current law. It is the imposition of a persuasive (rather than an evidential) burden that the applicant was objecting too. The decision also ignores the argument that--to comply with the presumption of innocence--where there is evidence of mental disorder which cases doubt upon *mens rea* it should be for the prosecution to prove sanity. There is otherwise the possibility that the accused will be convicted despite the presence of a reasonable doubt concerning his or her guilt.

It seems clear that the English law is impossible to reconcile with the presumption of innocence. Under the current law, as was recognised in *Best on Evidence* more than 70 years ago, "sanity is presumed in preference to innocence". [91] It may be that there are policy arguments which justify this exception to what is both a basic principle of the legal system and a fundamental human right, but they would have to be particularly compelling in order to warrant a requirement that an accused prove his or her innocence.

An impossible burden on the prosecution?

The persuasive onus on the accused at issue in *R. v. Chaulk* did in fact survive the constitutional scrutiny of the Supreme Court. Of the four judges who concluded that there was a conflict with the presumption of innocence, three were prepared to say that the imposition of the legal burden on insanity could be justified as a reasonable and demonstrably justifiable limitation under section 1 of the *Charter.* [92] The justification advanced by the Chief Justice for this application of section 1 was the practical impossibility for the prosecution of proving the sanity or disproving the insanity of the accused beyond a reasonable doubt. The nature of such an onus was variously described: ***L.Q.R. 492*** "impossibly onerous"; "tremendous difficulty"; "nearly impossible"; "impossible"; "virtually impossible"; "next to impossible"; and "unworkable". [93] Quite apart from the inconsistent use of adjectives, the argument of the Chief Justice does not become any more persuasive in its repetition. What seems to lie behind his approach is what one academic had earlier referred to as a fear of "swinging the jail door open to any individual who can stand up in court and claim insanity". [94] But there is no convincing explanation offered as to what it is about the defence of insanity which sets it apart in this respect from other legally recognised defences. A prosecutor can be faced with equal difficulties of proof in cases of, for example, sane automatism [95] or voluntary intoxication. [96] Fletcher has made the point that "acknowledging the prosecutor's problems of proof does not compel the conclusion that the defendant must bear the burden of persuasion on the issue; his difficulties properly justify only a demand that the defendant go forward on the issue". [97] The Chief Justice's conclusion, however, was that this alternative of an evidential burden (that is, a requirement that the accused merely raise a reasonable doubt) would be inadequate. He accepted the arguments of the Attorneys-General of Quebec and Ontario that it would be easy for an accused to "fake" the defence of insanity and raise a reasonable doubt. [98] But is it any easier for an accused to make a bogus claim of insanity than one of, say, duress? One would also have thought that the special disposal arrangements for those found not guilty by reason of insanity (with the possibility in English law of admission to a mental hospital with a restriction order of unlimited duration [99]) made false claims of insanity rather less likely than those of more

conventional defences. Healy's comment on the Chief Justice's approach is apposite: "To suggest that the exclusion of flimsy cases of insanity rests upon the distinction between an evidential and a legal burden is to sacrifice a *L.Q.R. 493* principle of general application for expediency in a small number of cases." [100]

Wilson J. was in dissent on this point. Her firmly expressed view was that there were insufficient reasons to justify overriding the presumption of innocence, given the alternative approach of placing an evidential burden upon the accused. She condemned the approach of the majority as a "prophylactic measure designed to fend off a hypothetical social problem that might arise if accused persons pleading insanity had to meet only an evidentiary burden". [101] Wilson J.'s conclusion was that the issue in *R. v. Chaulk* was "the quintessential case of the state acting as a "singular antagonist' of a very basic legal right of the accused". [102] The government's objective "to prevent perfectly sane persons who had committed crimes from escaping criminal liability on tenuous insanity pleas" [103] could be adequately met by the placing of an evidential burden upon the accused. [104]

The knowledge of the accused

In the judgment of McLachlin J. in *R. v. Chaulk* there is an observation to the effect that where insanity exists an accused will have little difficulty in proving it on a balance of probabilities. The proof of insanity, one is told, "depending as it does on the accused's state of mind, is peculiarly within the accused's power". [105] This is an interesting variation of a traditional justification used to modify the burden of persuasion: that some facts are particularly within the knowledge of the accused. [106] As Philp J.A. observed in *R. v. Godfrey*:

"His insanity is certainly a fact which an accused can reasonably be expected to prove. It is not just an exceptional fact, it is a fact that may be peculiarly known to the accused alone." [107]

This is too simplistic to be a convincing justification for a reversal of the legal burden of proof. It is also a line of reasoning which is potentially corrosive of many of the safeguards in the criminal justice system. The Supreme Court of the United States pointed out in *Tot v. United States*:

"In every criminal case the defendant has at least an equal fami *L.Q.R. 494* liarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." [108]

The imposition of a persuasive onus on the accused may well be effective in eliciting relevant evidence, but, as Underwood has recognised, it goes further than this: "Even if the defendant produces all the evidence available to him, the burden of persuasion remains with him, and close cases are resolved against him." [109] This means that there will be convictions in some cases which would have resulted in acquittal had the prosecution been required to disprove the exculpatory facts beyond a reasonable doubt. [110] This is the inevitable consequence of shifting the burden of persuasion to the accused in order to ease the task of the prosecutor in disproving facts within the particular knowledge of the accused.

The accused's access to evidence will be greater than that of the prosecution for any issue pertaining to his or her *mens rea.* But the general rule is that the accused is not required to prove anything as to his or her mental state: the burden of proving this rests on the prosecution. This rule applies even where a particular defence involves a matter which is prima facie within the particular knowledge of the accused. The Court of Criminal Appeal observed in *R. v. Spurge*:

"The facts however relating to a defence of provocation or self-defence … are often peculiarly within the knowledge of the accused …. Yet … the onus of disproving them undoubtedly rests upon the prosecution. There is no rule of law that where facts are peculiarly within the knowledge of the accused the burden of establishing any defence based on these facts shifts to the accused." [111]

Unlike insanity, only an evidential burden is placed on the accused in respect of defences such as provocation or self-defence. The fact that the accused has better access to the relevant evidence cannot in itself provide an adequate justification for imposing

a persuasive, rather than an evidential, burden on the accused: "once he produces *L.Q.R. 495* his evidence for examination at the trial, his advantage evaporates and cannot be used against him any further". [112]

Insanity as an excuse

A recent academic argument is that it is acceptable for an accused to bear the persuasive burden on insanity since "this rule deals with an excuse". [113] Stein has put forward the argument that the familiar distinction between justification and excuse should be utilised as the factor determinant of whether a persuasive burden can be placed on the accused in respect of a defence. The essence of a justification is that it renders lawful a notional infringement of the criminal law. Hart suggested that a justified act is one which "the law does not condemn, or even welcomes". [114] An accused who raises a justificatory defence (for example, self-defence) is asserting that nothing wrongful has been done for which he or she should be punished. Clearly the accused who pleads insanity as a defence is not claiming to have had an entitlement to infringe the criminal law in the way in which he or she did. According to Hart, the essence of an excuse is that the act may be "deplored, but the psychological state of the agent when he did it exemplified one or more of a variety of conditions which are held to rule out the public condemnation and punishment of individuals". [115] Stein emphasises that an excuse such as insanity is available to an accused "on the grounds of leniency, as a concession to human frailty, despite the fact that his act was damaging to the public interest protected by a criminal norm". [116] It is the rather vague concept of the public interest which forms the foundation for Stein's reasoning. He maintains:

"The principle of protecting the innocent should protect only those accused who have not been established to have infringed the public interest protected by the criminal law. Those who, having infringed such an interest, are asking to be excused ought not to be entitled to the similar degree of protection from the risks of error." [117]

Stein is prepared to argue "that the burden of proving excuses and the corresponding risks of error ought to be borne by the accused and *L.Q.R. 496* that in order to benefit from an excuse, it ought to be established by the accused on the balance of probabilities". [118]

If accepted, this approach would return the law in relation to excuses to its pre-*Woolmington* condition. English criminal law would have to impose a persuasive burden on the accused in relation to defences such as duress, intoxication and provocation. Stein's whole approach is counter to the modern trend "away from adjudicating criminal status on doubt-ridden findings of fact". [119] Insanity has come to be regarded as an exception to a (desirable) general rule imposing the burden of establishing guilt on the prosecution. Would it be unfair to describe as eccentric a contemporary argument that insanity is the desirable example which should be followed in respect of a number of other defences? Heterodoxy need not be fatal to an academic argument, but there is fundamental conceptual difficulty which undermines Stein's case: "the simple dichotomy [excuse/justification] is too crude to serve as a foundation for the orderly development of the law of exculpatory defences". [120] As above, insanity is often used as a straightforward example to illustrate the distinction: "a sadistic killing committed by an insane person can perhaps be excused but is obviously not justified". [121] As a matter of language this seems correct, but insanity does not fit so easily into the legal category of excuse. In one of the better known discussions, Robinson has stated: "An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him." [122] The problem for Stein is that a finding of not guilty by reason of insanity does not necessarily remove the possibility of punishment. [123] As Colvin has stated:

"With respect to insanity, in particular, the term "excuse' does little to elucidate the most notable feature of the defence, which is the special verdict creating liability to alternative coercive measures. It would … be the worst kind of formalism to deny the penal character of the coercive measures which can follow the special verdict of insanity." [124]

Thus Stein's argument breaks down in relation to insanity, his axiomatic case of an excuse where it is permissible to place a persuasive burden on the accused. If there are reasons which suggest that a per *L.Q.R. 497* suasive burden should be placed on the accused in respect of excuses such as duress [125] or provocation (which is doubtful), they cannot apply to insanity.

V. PROVING INVOLUNTARINESS: SANE AND INSANE AUTOMATISM

The legal significance of automatism is that it can provide the accused with a means for raising a doubt whether he or she acted with the requisite *mens rea* and voluntarily. These are two fundamental elements in the prosecution case. Originally automatism was seen primarily as a means for denying that the accused acted with *mens rea.* Later decisions have tended to regard automatism as pertaining to the voluntariness of the accused's conduct: "The basis for automatism is that some mental malfunction destroys the defendant's capacity to control his or her actions so that the act is not voluntary." [126] Where this "mental malfunction" takes the form of a disease of the mind the involuntariness is governed by the M'Naghten Rules and the burden of persuasion will rest with the accused. It is possible, however, for a sane individual to act in an involuntary manner. In a case of sane automatism the legal burden remains on the prosecution to disprove the involuntariness of the accused's conduct. North J. stated in *R. v. Cottle*: "If then the defence leads evidence to show that the prisoner was unconscious of what he was doing … because he was suffering from a blow or something of that kind … the general burden of proof remains throughout the trial on the Crown, and the only onus that rests on the prisoner is the particular burden of providing some evidence in support of the plea." [127] Thus the placement of the burden of persuasion depends upon the distinction which the law recognises between sane [128] and insane automatism. The difficulty from an evidential perspective is that the substantive law has failed "to draw a satisfactory line between pleas ***L.Q.R. 498*** which raise insanity within the M'Naghten Rules and pleas which raise mental irresponsibility falling outside them". [129] As Barwick C.J. explained in *Ryan v. The Queen,* the law seeks to distinguish "between an unwilling act and a willed act the product of a diseased mind which knows not the nature and quality of the willed act". [130] Unfortunately courts have not tended to draw the necessary distinction with any degree of subtlety, [131] preferring instead to apply a very "blunt" [132] rule. The prevailing test is that set out by Martin J.A. of the Ontario Court of Appeal in *Rabey v. The Queen*:

"In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some external factor such as, for example, concussion." [133]

Cases are categorised as examples of sane or insane automatism on the basis of the external or internal origins of the involuntariness. [134] One problem with this test is its focus upon the source of the incapacity rather than its effect. This raises a conceptual difficulty in that, as Schoop has pointed out, "it is the functional impairment rather than the underlying disabling condition" [135] which justifies the availability of a defence. Defendants can be placed in different legal categories in spite of the fact that they acted in a similarly involuntary manner. For example, a diabetic may perform the *actus reus* of an offence and yet by unaware of his or her actions either because of hyperglycaemia (high blood sugar level) or hypoglycaemia (low blood sugar level). [136] Diabetes is an internal factor. If the accused acts as an automaton as the result of a hyperglycaemic attack the sole defence available to him or her is insanity. In contrast, hypoglycaemia is not the result of the initial disease of diabetes. It is caused either by treatment in the form of too much insulin, or by insufficient food to counter-balance the insulin. The administration of insulin is an external factor. If the ***L.Q.R. 499*** involuntariness is the result of hypoglycaemia the defence of sane automatism is available.

Both the unsatisfactory nature of this area of law, and the problems caused by placing the persuasive burden in respect of insanity on the accused, are highlighted by the distinction which the law draws between sane and insane automatism. As Sholl J. noted in *R. v. Carter*: "The importance of the distinction is that not only a different consequence ensues upon the acceptance by the jury of the plea but also that a different onus attaches." [137] If the jury has a reasonable doubt about the voluntariness of the accused's conduct because of evidence of an external factor (hypoglycaemia), he or she will be acquitted. But if the reasonable doubt is as to an internal factor (hyperglycaemia), the accused should be convicted. This is because, if the automatism is the result of an internal factor, it will be incumbent on the accused to prove this on the balance of probabilities. Quite apart from the absurdity of labelling a diabetic as insane, [138] both accused may have acted in precisely the same way and with precisely the same state of mind (though with differing aetiologies). Sane and insane automatism are thus, in Hall Williams's singular phrase, "ranged on opposite sides of an evidential chasm". [139] "It is", as Smith and Hogan have pointed out, "difficult to see why a man whose alleged disability arises from a disease of the mind should be convicted whereas one whose alleged disability arises from some other cause, would, in exactly the same circumstances, be acquitted." [140]

Sane automatism: the evidential burden

Once an evidential basis has been laid for the defence of sane automatism, "the burden which is always on the prosecution, to prove that the acts were voluntary, becomes an active burden and it is for the prosecution to satisfy the jury at the end of the day that the actions were voluntary in the sense that they were fully conscious". [141] This burden of proving the voluntariness of the accused's conduct is eased by the prosecution's entitlement to rely upon a "presumption that every man has sufficient mental capacity to be responsible for his crimes". [142] As Mason C.J., together with Brennan and McHugh JJ., explained in *The Queen v. Falconer*:

L.Q.R. 500 "In the absence of contrary evidence, it is presumed … that an act done by a person who is apparently conscious is … done voluntarily. That presumption accords with, and gives expression to, common experience. Because we assume that a person who is apparently conscious has the capacity to control his actions, we draw an inference that the act is done by choice." [143]

Unlike the presumption of insanity, however, the presumption of mental capacity has not resulted in a persuasive onus being placed on the accused. What is necessary to secure an acquittal on the ground of sane automatism is "credible evidence assigning a cause sufficient to explain what, if it happened at all, must be viewed as an extraordinary event". [144]

There are two possible approaches to the nature of the evidential burden which rests upon the accused in respect of sane automatism. The first, which is not that prevailing in English law, is that "A mere scintilla of evidence of mental dysfunction should support an application for a direction on involuntariness." [145] If an accused claims to have perpetrated the *actus reus* of an offence accidentally or by mistake, circumstantial evidence, together perhaps with the testimony of the accused, will be sufficient. The only question will be as to whether the trier of fact is satisfied that the evidence raises a reasonable doubt as to the guilt of the accused. One view would be that sane automatism should be treated in exactly the same way, since it likewise involves a denial of an element of the offence. This approach was most clearly expressed by Gresson P. in *R. v. Cottle*:

"Where … the absence of consciousness or of volition is asserted as arising from some condition not properly to be classified as "disease of the mind' … the question for the jury is whether the Crown has discharged its onus proof. A jury is not likely readily to accept a plea of automatism … when it rests substantially on the assertion of the accused himself, who has a powerful motive to feign or exaggerate a condition incapable of objective test. But, however insufficient or inconvincing the evidence … of automatism is, if it is asserted as a defence, it must be put to the jury: it is for the jury to judge whether it raises enough doubt to result in the Crown not having discharged its onus of proof." [146]

L.Q.R. 501 The second perspective on the evidential burden is premised on the rather different bases of judicial misgivings about the defence and a lack of faith in the jury system: "judges everywhere distrust the plea of unconsciousness and apprehend that jurors may repose hasty confidence in it". [147] In *Bratty v. Attorney-General for Northern Ireland* the House of Lords determined that, before the defence of automatism can be left to the jury, a "proper foundation" [148] must be laid. And it is a question of law for the trial judge whether there is sufficient, proper evidence which the jury can be permitted to consider. Lord Lane C.J. stated in *R. v. Burgess*:

"Where the defence of automatism is raised by a defendant, two questions fall to be decided by the judge before the defence can be left to the jury. The first is whether a proper evidential foundation for the defence of automatism has been laid. The second is whether the evidence shows the case to be one of insane automatism, that is to say, a case which falls within the M'Naghten Rules, or one of non-insane automatism." [149]

What type of evidence can constitute a "proper evidential foundation" for the defence of sane automatism? In *R. v. Burr* North J. suggested that what is needed is "evidence … that the accused person acted through his body and without the assistance of the mind, in the sense that he was not able to make the necessary decisions and to determine whether or not to do the act". [150] There are authorities which suggest that "some expert medical opinion will be required before an issue of sane automatism can realistically said to be raised". [151] Gaudron J. stated in *The Queen v. Falconer*: "In practical terms a claim of involuntariness which is not based on mental illness ***L.Q.R. 502*** is almost certain to be treated as frivolous unless supported by medical evidence that identifies a mental state in which acts can occur independently of the will, assigns a causative explanation for that state and postulates that the accused did or may have experienced that state." [152] This rule concerning the nature of the evidence

required to form a foundation for the defence can lead to strange results. In *Cook v. Atchison* [153] the accused raised a defence of sane automatism (in the form of a "mild blackout") to a charge of dangerous driving. No supporting medical evidence was introduced. The magistrates misdirected themselves, in that they applied the test of whether the accused had satisfied them on the balance of probabilities that he was acting as an automaton. As the Divisional Court pointed out, of course, this approach was incorrect as it is only necessary for an accused to raise a reasonable doubt. In fact the magistrates were satisfied on the balance of probabilities, but the Divisional Court held that there was not even a reasonable doubt raised by the evidence of blackout. Even though the magistrates were satisfied to the heavier burden, as a matter of law the evidence put before them was insufficient to satisfy the lighter burden. The approach of the courts in cases such as this reflects a degree of judicial scepticism towards the credibility of examples of automatism. "Blackout" has been described as "one of the first refuges of a guilty conscience and a popular excuse". [154] And as Moffitt J. further pointed out in *R. v. Tsigos*:

"It may be added, by hypothesis, the person has no consciousness or, at least no memory of the relevant time and so has no capacity to give evidence of his then condition. On this basis his evidence is either a "refuge' or "excuse' or, at best, an unqualified opinion of doubtful validity upon a scientific subject. Thus the proper foundation could not be laid except by means of proper scientific evidence, which in most cases would need the support of some qualified scientific opinion properly based, explaining the cause of the mental incapacity." [155]

It is these considerations which have led the courts to draw a distinction between denials of *mens rea* and claims of lack of mental capacity. If an accused claims to have lacked the necessary intention or recklessness, perhaps on the basis of an accident or a mistake, this explanation cannot be withdrawn from the jury by the judge. But if he or she claims to have lacked the mental capacity to form the requi ***L.Q.R. 503*** site *mens rea,* he or she "cannot generally be taken to assert something within his [or her] personal knowledge". [156] The law therefore requires the accused to produce evidence that his or her actions were indeed involuntary.

VI. SANE AUTOMATISM AND INSANITY AS CONCURRENT DEFENCES

It was seen earlier that the courts have sought to prevent evidence of insanity being used by an accused to raise a reasonable doubt as to the presence of *mens rea.* [157] In just the same way the courts have sought to erect a Chinese wall between evidence supportive of a defence of insane automatism and the issues of *mens rea* and voluntariness in the absence of insanity. *Bratty v. Attorney-General for Northern Ireland* is a clear authority for the proposition that the possibility of an unconditional acquittal (on the grounds of sane automatism) depends upon there being an evidential basis which is not suggestive of insanity. [158] Where the accused has given evidence of automatism emanating from a disease of the mind, this evidence can only be considered by the jury in determining whether the presumption of sanity has been overcome. It would be necessary for the accused to prove his or her insane automatism on the balance of probabilities. This same evidence cannot be used to overcome the presumption of mental capacity and raise a reasonable doubt concerning the voluntariness of the accused's conduct. Lord Morris of Borth-y-Gest explained:

"The submission on behalf of the appellant that the medical evidence could support a plea of automatism so that the jury might have had reasonable doubt whether the actions of the appellant which caused the death were conscious and voluntary involved in effect a repetition of the plea of insanity while endeavouring to avoid the well-established rules as to how insanity must be established." [159]

Thus there can be no evidential foundation for the defence of sane automatism if the evidence is consistent only with the hypothesis that the accused suffered from a disease of the mind. Deane and Dawson JJ. stated in *The Queen v. Falconer*:

"When, on the evidence, an accused's acts can only have been involuntary if he was suffering from a mental disease or natural mental infirmity, the prosecution is entitled to rely upon the pre ***L.Q.R. 504*** sumption that every person is of sound mind. That means that a defence of insane automatism can only succeed if it is established on the balance of probabilities." [160]

If it is the opinion of the trial judge that the evidence is consistent only with the postulate that the accused suffered from a disease of the mind, the jury will not be permitted to consider a defence of sane automatism. [161]

In *Bratty* Viscount Kilmuir L.C. suggested that, since the jury had not been satisfied of the defendant's insanity, this necessarily implied that they had rejected the possibility of sane automatism. [162] This need not have been the case. It does not follow automatically that, because insanity could not be proved to the requisite degree, there could be no reasonable doubt as to *mens rea* or voluntariness. [163] Bratty's argument before the Court of Criminal Appeal had been based on the premise "that the whole of the evidence on the issue of insanity was relevant on the issue whether automatism itself existed however it was caused; in view of the onus being on the defence to show on a preponderance of probability that the necessary constituents of the *M'Naghten* formula were present … although the evidence might have failed to prove some constituent of insanity, the lack of consciousness itself might have seemed a genuine possibility to the jury, and the jury might at least have had a reasonable doubt whether the appellant was conscious of his acts". [164] Although the logic of this argument appears strong, it could not be accepted by a court which wished to preserve the special rule governing the burden of proof for the defence of insanity. The accused cannot be permitted "to escape the onus of proof of insanity" [165] if evidence has been introduced suggestive of a disease of the mind. As Moffitt J. stated in *R. v. Tsigos*: "Where the explanation for the unconsciousness of the action, should it prove to be so, is disease of the mind, any acquittal depends on establishing a defence under the M'Naghten Rules and cannot be obtained by reversing the onus of proof and relying on the same material to raise a doubt as to whether the act complained of was the conscious act of the accused." [166] The import of the law is that, in a case where the issue of insanity is at large, an accused can be ***L.Q.R. 505*** convicted despite the possibility of a reasonable doubt as to the voluntariness of his or her conduct. In this regard the relationship between voluntariness and insanity is the same as that between *mens rea* and insanity. [167] If the accused introduces evidence upon which a jury might conclude that he or she was suffering from a disease of the mind, it must be established on the balance of probabilities that there was a "total incapacity to appreciate the physical character of his [or her] actions". [168] If not, the ordinary inferences of *mens rea* and voluntariness upon which the prosecution relies will not be contested. Evidence pertinent to the question of insanity, regardless of how relevant it seems, cannot be used to raise a reasonable doubt as to the mental capacity of the accused. A separate evidential foundation is required for the defence of sane automatism. The courts strive to keep the defence of insanity, with its distinctive burden of proof, separate from questions of *mens rea* and voluntariness. As mentioned in the earlier discussion of *mens rea* and insanity, what underpins this approach is a concern with social protection. [169] Potentially dangerous individuals could be unconditionally acquitted if it were possible to use evidence suggestive of insanity as the foundation for an argument of lack of *mens rea* or voluntariness falling short of insanity. [170]

The stricture of Viscount Kilmuir as to the necessity of keeping separate the issues of sane and insane automatism was made subject to the proviso that it applied only where "the alleged automatism is based solely on a disease of the mind within the M'Naghten Rules". [171] His Lordship did concede that there might be cases where defences of sane and insane automatism would both have to be put before the jury:

"What I have said does not mean that, if a defence of insanity is raised unsuccessfully, there can never, in any conceivable circumstances, be room for an alternative defence based on [sane] automatism…. There might be a divergence of view as to whether there was a defect of reason from disease of the mind … The jury might not accept the evidence of a defect of reason from disease of the mind, but at the same time accept the evidence that the prisoner did not know what he was doing. *But it should be noted that the defence would only have succeeded because the necessary foundation had been laid by positive evi* ***L.Q.R. 506*** *dence which, properly considered, was evidence of something other than a defect of reason from disease of the mind.*" [172]

There are in fact a number of authorities which recognise "that there may be cases, perhaps rare, in which the evidence allows alternative contentions, namely that an accused's acts were involuntary either by reason of mental disease or natural mental infirmity or by reason of the operation of events upon a normal mind". [173] In principle it is possible for evidence to leave open alternative findings of sane automatism or insanity (perhaps in the form of insane automatism). There may have been conflicting psychiatric opinions. [174] This situation is most likely to arise in cases which fall on the borderline between sane automatism and disease of the mind, for example, in cases of psychological blow automatism. [175] In *R. v. Wiseman* [176] a psychiatrist called by the defence testified that an accused charged with the murder of her two children had perpetrated the killings in a "dissociative state". He maintained that a series of shattering emotional experiences had led to her being in a condition where her actions were not controlled by her conscious mind. Her actions were involuntary or unconscious, but not the result of a disease of the mind. Two other psychiatrists called by the defence gave evidence suggestive of insanity at the time of the killings. Cases such as this can arise where there is some evidence which does point to a disease of the mind and insanity, and other evidence, consistent with sanity, which is capable of providing the proper foundation for a defence of automatism. In other cases, "a dispute may arise as to which particular factors are responsible for the alleged involuntariness". [177]

In *R. v. Burns* the Court of Appeal held that in such circumstances the jury should be directed "that, if they thought other factors than disease of the mind might be a cause of his unawareness, they should consider automatism even if they rejected insanity". [178] If the jury entertained a reasonable doubt that the accused had acted in a state of sane automatism, he should be acquitted unconditionally. The ***L.Q.R. 507*** Court of Appeal cited with apparent approval a direction suggested by counsel for the appellant:

"It is for the defence to satisfy you on a balance of probabilities that the appellant was unaware of what he was doing and that unawareness was caused by disease of the mind; if you consider, however, that there is evidence that his unawareness was caused at least partly by factors other than disease of the mind, then it is for the prosecution to negative that it was and to satisfy you beyond reasonable doubt that he knew what he was doing." [179]

Confirmation that this is the correct approach has been provided by the majority of the High Court of Australia in *The Queen v. Falconer.* [180] Accordingly, the first question for the jury to consider is "whether the prosecution has proved its case beyond reasonable doubt by negativing the possibility that the accused was acting involuntarily as a result of some mental state which is or may be experienced by a healthy mind". [181] If the answer to this question is in the negative, the accused is entitled to an unconditional acquittal. But "if the answer to the first question is in the affirmative, the jury should go on to ask a second question, namely, whether the accused has proved, on the balance of probabilities, insanity". [182] If the answer to this second question is in the affirmative, the accused should found not guilty by reason of insanity. If the answer is in the negative, then the accused would have to be found guilty.

Because of the different burdens of proof applicable to sane automatism and insanity it is a formidable task to direct a jury in such terms. [183] It has been suggested on more than one occasion that: "The distribution of the different burdens of proof should be the same in the case of insane and non-insane automatism." [184] The exhortation would be that the accused should at most bear an evidential burden for either defence. [185] If it is a general principle of criminal law that the conduct of an accused must be voluntary before it can attract criminal liability, [186] it would be quite inappropriate to place a persua ***L.Q.R. 508*** sive burden on the accused in respect of the matter. As Viscount Kilmuir stated in *Bratty*:

"One must not lose sight of the overriding principle, laid down by this House in [*Woolmington*], that it is for the prosecution to prove every element of the offence charged…. [I]f after considering evidence properly left to them by the judge, the jury are left in real doubt whether or not the accused acted in a state of [sane] automatism, it seems to me that on principle they should acquit because the necessary mens rea-if indeed the actus reushas not been proved beyond reasonable doubt." [187]

A very different approach was proposed by the minority in *The Queen v. Falconer.* [188] Mason C.J., together with Brennan and McHugh JJ., maintained that there was a persuasive burden on the accused to prove that the involuntariness was not the result of insanity. Their view was that in cases of automatism there is a prima facie classification of insanity, [189] and it was up to the accused to prove otherwise on the balance of probabilities. It was suggested, in effect, that the presumption of mental capacity should become a legal, rather than an evidential, presumption. It was claimed that there was no conflict with *Woolmington,* since "the issue is not one of criminal responsibility but the cause of the condition which deprived the accused of criminal responsibility". [190] The reasoning is unconvincing. The preceding quotation from the speech of Viscount Kilmuir in *Bratty* makes it clear that there is a conflict with *Woolmington.* And stating that the issue is not one of criminal responsibility quite misses the point that an accused will be required to prove his or her innocence. Involuntariness being incompatible with a finding of guilt, the presumption of innocence requires that the ultimate burden of proving the voluntariness of the accused's conduct must rest with the prosecution. As Gaudron J. correctly identified, what lay behind the minority's approach was the fear "that a person could escape criminal liability and avoid a verdict of acquittal on the ground of [insanity] merely by raising a claim of involuntariness and failing or refusing to identify its cause". [191] But she rightly concluded:

"Although that is a theoretical and anomalous possibility, so unlikely is it in that, in my view, it can be treated as insignificant for practical purposes. Certainly, it cannot warrant a denial of the ordinary operation of the criminal onus of proof in a case ***L.Q.R. 509*** where there is a real issue of non-insane involuntariness for the consideration of the jury." [192]

This possibility is unlikely because the courts have insisted upon a proper, evidential foundation being laid for the defence of sane automatism before it can be considered by the jury.

VII. AN EVIDENTIAL APPROACH

The placement of an evidential burden upon the accused "is an economical way to screen out issues extraneous to the case at hand and thus to promote efficient litigation". [193] If the accused did not bear an evidential burden in respect of defences, it would be incumbent on the prosecution to rebut every possible defence which might be relied upon. Reference has already been made to the debate in *R. v. Chaulk* [194] as to the adequacy or otherwise of an evidential burden as a barrier against spurious defences of insanity. That discussion can now be seen in better perspective after the account of the "proper foundation" doctrine applied by the courts in relation to sane automatism. This "ensures that the jury shall not be tempted to reach a compassionate finding upon insufficient evidence". [195] Appellate courts have encouraged exclusion of inadequate defences of sane automatism from the jury's consideration. [196] Indeed, a stronger argument could be made that the approach of the courts has been too strict. There is little evidence to support the argument that the evidential burden can too easily be satisfied by an accused. [197] An accused cannot "calculate so finely or divide his evidence so precisely" [198] as to produce just enough evidence to pass the judge but leave the prosecution in ignorance of evidence which is peculiarly inaccessible to it. It was (Professor) McNaughton who explained that the evidential burden is a function of the persuasive burden, suggesting that the two are "*not* so very different". [199] In order to determine whether the evidential burden is satisfied, the persuasive force of the evidence put forward on the issue has to be evaluated. The two bur ***L.Q.R. 510*** dens are intended to fulfil the same purpose: to determine the outcome of a case in the event of an insufficiency of proof. [200]

Under the M'Naghten Rules the accused has, of course, always carried the evidential, as well as the persuasive, burden in respect of insanity. As Lord Goddard C.J. observed in *R. v. Windle*: "if no evidence is given of insanity as understood by the law, there is no issue on the question to be left to the jury any more than in the case of any other issue which may be raised in a case and which is unsupported by evidence". [201] It is difficult to see what further purpose is served by imposing a persuasive burden on the accused. If the concern is with unmeritorious defences being raised, this has always seemed more likely in respect of sane automatism (which results in an unconditional acquittal). And there is now in any event a statutory evidential burden in respect of insanity (which does not apply to sane automatism). Section 1 of the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 provides that a jury shall not return a verdict of not guilty by reason of insanity except upon the evidence of two or more medical practitioners, at least one of whom has been approved by the Home Secretary as having special experience in the field of metal disorder. Two sources of judicial anxiety have been removed from the legal landscape: the feigning accused [202] and the corrupt and/or unreliable medical expert. [203]

What lies behind the argument that the accused should bear no more than an evidential burden in respect of insanity is the belief that he or she should receive the benefit of the doubt on the issue: "that the jury ought not to return a verdict of guilty, so long as a reasonable doubt rests in their minds of the prisoner's capacity to commit the offense charged". [204] The key question is that posed by Harlan J. in the course of delivering the judgment of the U.S. Supreme Court in *Davis v. United States*: "How, then, upon principle or consistently with humanity can a verdict of guilty be properly returned if the jury ***L.Q.R. 511*** entertain a reasonable doubt as to the existence of a fact which is essential to guilt, namely, the capacity in law of the accused to commit the crime?" [205] This rhetorical question is unanswerable. The simple fact is that the placing of a persuasive burden on the accused is equivalent to "a presumption of guilt". [206] Harlan J. pointed out that to maintain that the presumption of sanity "must absolutely control the jury until it is overthrown or impaired by evidence … to the reasonable satisfaction of the jury, is in effect to require him to establish his innocence, by proving that he is not guilty of the crime". [207]

Law reform proposals

In its *Eleventh Report* published in 1972 the Criminal Law Revision Committee recommended that the burden of proving the defence of insanity should be an evidential one. The Committee argued strongly against the imposition of persuasive burdens on defendants, stating that "both on principle and for the sake of clarity and convenience in practice burdens on the defence should be evidential only". [208] The supporting arguments fall into three general categories. The first is that the imposition of a persuasive burden upon an accused is offensive to the legal system. A reverse onus provision replaces the presumption

of innocence with a presumption of guilt. The second concerns the difficulties associated with the need for judges to give complicated directions on the differing burdens of proof. The third argument is that the imposition of a persuasive burden on defendants is unjustified and unnecessary. The practical reasons said to justify this can be met by placing merely an evidential burden on the accused. [209]

A rather more complex set of reform proposals has been included in the Law Commission's *Draft Criminal Code.* [210] These are based in large part on those of the Butler Committee. [211] There would be a new verdict of "not guilty on evidence of mental disorder". Clauses 35 and 36 provide that this verdict is to be returned where the mental disorder is proved on the balance of probabilities (whether by the ***L.Q.R. 512*** prosecution or by the defendant). [212] The *Draft Criminal Code* leaves unaddressed the concerns of the Criminal Law Revision Committee. It is unfortunate that the Law Commission followed instead the Butler Committee's approach to the burden of proof, [213] given that this had been described as "fatally flawed by its hypnotic obsession with retaining the onus rule". [214]

VIII. CONCLUSION

The continuing survival of the legal rule which places the persuasive burden of insanity on the accused reveals much about both the role of the defence and the meaning to be attributed to the presumption of innocence. The rule appears to be an anachronism because the modern trend has been towards a holistic view of criminal responsibility. This regards insanity as a negation of culpability, rather than as a new issue introduced by the accused in order to escape punishment. [215] As Breese J. stated in *Hopps v. The People*: "Sanity is guilt, insanity is innocence; therefore, a reasonable doubt of the sanity of the accused, on the long and well-recognized principles of the common law, must acquit." [216] One of these fundamental principles is the presumption of innocence. If an accused is required to prove insanity on the balance of probabilities in order to avoid a finding of guilt, there is a violation of this principle. A finding of guilt will be permitted despite the presence of a reasonable doubt as to the culpability of the accused. [217] A second elemental principle is that the prosecution has to prove beyond reasonable doubt the presence of *mens rea* (if ***L.Q.R. 513*** required by the definition of the offence). [218] It is the fact that the presumption of sanity appears to relieve the prosecution of this fundamental duty which has most troubled academic commentators. [219] For example, Elliott has written: "To absolve the prosecution from its obligation to prove the mental element of a crime in cases where there is evidence that the accused is mentally ill is no more justified than to absolve it of the obligation to prove that it was the accused, and not some other person, who did the criminal act." [220] What this powerful statement misses is that the courts are just as concerned with social protection as they are with issues of individual fairness or responsibility. [221] As Lord Diplock recognised, the dominant purpose of the insanity defence under the M'Naghten Rules is "to protect society against the recurrence of dangerous conduct". [222] There is a constant tension between these two competing values, which goes some way to explaining (but not justifying) the complexities and paradoxes which pervade this area of law. [223]

The question of the burden of proof cannot be viewed in isolation from wider debates in society about crime levels and the conviction and punishment of offenders. In 1923 the Committee on Insanity and Crime suggested that "if the offender tends to escape punishment by reason of nicely balanced doubts upon a diagnosis of uncertain mental conditions, the observance of the law is gravely hindered". [224] What is troubling to some about the insanity defence is that, even though the prosecution may have proved a very serious *actus reus,* "the defendant may be able to defend without showing any justification for what he did". [225] Martin has given philosophical support to this perception with his contention that a person found not guilty by reason of insanity "is, nonetheless, an adjudged violator". [226] The ***L.Q.R. 514*** basis for this argument is that "the fact of violation and the fact that the accused is the perpetrator are essential material facts presupposed in any judicially established excuse of insanity (which would then issue in the verdict "not guilty by reason of insanity')". [227] There is a view that the accused who is found not guilty because of insanity is in some sense less innocent than the accused who receives an unconditional acquittal: the accused who acted under an insane delusion is still culpable in a way that one who brings about the forbidden result accidentally is not. [228] This is what underpins some arguments supportive of the imposition of a persuasive, rather than an evidential, burden on the accused. According to Stein, "what can justify an imposition of a greater risk on an accused … is only a distinction in substance between an ordinary plea of "not guilty' and a special inferior, claim of innocence embedded in his defence". [229] Great confidence in the ability of the substantive criminal law to draw a line between sanity and insanity

is required to maintain this argument. The record of the courts in the classification of conduct as sane or insane automatism gives little ground for such optimism. [230]

The insanity defence performs two independent functions. One is the identification of those who cannot be found guilty because of their mental condition at the time of the infringement of the criminal law. A second function--most apparent in the context of automatism--is that of separating those who are to be subject to the special coercive powers of the State (consequent upon a finding of not guilty by reason of insanity [231]) from those who are to be set free unconditionally (following a verdict of not guilty *simpliciter*) or subject to normal sentencing arrangements (if found guilty). The first question is concerned with individual blameworthiness; the second with justifying constraints upon individual liberty (on the basis of dangerousness [232]). ***L.Q.R. 515*** If insanity cannot be proved by the accused, he or she is subject to the normal consequences which attend a finding of guilt. The law requires any doubt about sanity to be resolved in favour of a finding of guilt. In this context, as Eule has pointed out:

"The presumption [of sanity] here serves to indicate a social preference for the prison. It is less a position on the good or bad nature of man than on the preferred mode of treatment to be given to those who commit antisocial acts." [233]

The burden is on the accused to prove the appropriateness of the special verdict, rather than the finding of guilt which would otherwise ensue. The philosophy underpinning the evidential approach is very different. It is neatly encapsulated in the following quotation from the judgment of Wilson J. in *R. v. Chaulk*: "it is better that a guilty person be found not guilty by reason of insanity and committed for psychiatric treatment than that an insane person be convicted of a crime". [234]

The two issues currently subsumed in the insanity defence need to be kept separate. [235] If insanity is construed as pertaining solely to the question of an individual's criminal responsibility, the arguments for a different evidential rule to that applicable to other defences (sane automatism in particular) fall away. [236] The legitimate aim of social protection is furthered by the existence of the discrete defence of insanity (with evidence of mental malfunction not generally otherwise permitted to negative inferences of *mens rea* [237] or voluntariness) and the special arrangements which can follow a finding of not guilty by reason of insanity. [238] An accused who is found not guilty on this basis (who is "innocent") may be subject to punishment in the form of confinement and incapacitation: "treatment and rehabilitation-insofar as criminal insanity is concerned-constitute an independent mode of punishment". [239] The fate of the individual consequent upon a finding of not guilty by reason of insanity should be the subject of a ***L.Q.R. 516*** separate judicial proceeding. [240] The State would bear the burden of proving beyond reasonable doubt the necessity of coercive measures, as indeed it always should when it seeks to deprive an individual of his or her liberty. [241] The response to this argument may be that it is a reasonable inference that an accused acquitted because of insanity at the time of the forbidden act remains dangerous at the time of verdict and disposition. [242] On this view, the theoretically distinct issues of guilt and disposal can be combined as a practical matter in the same proceeding. The counter to this argument is that the finding of not guilty by reason of insanity speaks only to the past, saying little about the accused's present mental state. Parliament has conceded as much in the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, with the abolition of automatic commitment for nearly all offences. [243] It is even possible for there to be an absolute discharge. The presumptive link between insanity at the time of the *actus reus* and present dangerousness has been broken.

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Footnotes

1 *Hill v. Baxter* [1958] 1 Q.B. 277 at p. 285 *per* Devlin J. The legal burden of proof in respect of the closely related plea of diminished responsibility is placed upon the accused by statute: Homicide Act 1957, s.2(2). (In Scotland the common law imposes such an onus; see *H.M. Advocate v. Braithwaite* 1945 J.C. 55.) Although this article does not discuss diminished responsibility, many of the general conclusions reached in respect of the insanity defence are equally applicable to it. And many of the broader arguments

of principle are equally relevant to those instances where a statute (explicitly or implicitly) places a persuasive burden on the accused.

2 The term "burden of proof" can be used in two distinct connections. Primarily it is used to refer to the responsibility of a party to persuade the jury of the existence or non-existence of a particular fact (*e.g.,* whether the insanity of the accused at the time of the offence has been established by the evidence). In this article this responsibility will be labelled the legal or persuasive burden. The term can also be used to refer to the responsibility of a party to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue (*e.g.,* whether the accused committed the offence involuntarily and in a state of sane automatism). If there is insufficient evidence to make the issue a live one, there will be a ruling by the trial judge that the existence or non-exis-tence of the fact cannot be considered by the jury. This is best described as the evidential burden. The primary distinction between the two burdens is quantitative. See, further, text accompanying nn. 199-200, *infra.*

3 *Thomas v. The Queen* (1960) 102 C.L.R. 584 at p. 603 *per* Windeyer J.

4 European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6(2); International Covenant on Civil and Political Rights, Art. 14(2); Universal Declaration of Human Rights, Art. 11(1). See also New Zealand Bill of Rights Act 1990, s.25(*c*); Canadian Charter of Rights and Freedoms, s.11(*d*).

5 *R. v. Kemp* [1957] 1 Q.B. 399 at p. 402 *per* Devlin J. A classic citation is *R. v. Layton* (1850) 4 Cox C.C. 149 at p. 155 *per* Rolfe B.: "Every man committing an outrage on the person or property of another must be, in the first instance, taken to be a responsible being."

6 P. Healy, "R. v. Chaulk: Some Answers and Questions on Insanity" (1991) 2 C.R. (4th) 95 at p. 99. See also A. A. S. Zuckerman, *Principles of Criminal Evidence* (1989), p. 112.

7 [1945] N.Z.L.R. 584 at p. 596. See also *H.M. Advocate v. Mitchell* 1951 J.C. 53 *per* Thomson L.J.C.: "on this issue the burden of proof is on the defence, because in our law there is a presumption that a man is sane". Similarly, *Lambie v. H.M. Advocate* 1973 J.C. 53 at p. 57 *per* Emslie L.J.G.: "it is quite clear that there is in [insanity] an onus upon the defence to establish it since proof of insanity is required before the presumption of sanity can be displaced".

8 J. Dressler. *Understanding Criminal Law* (1987), p. 294. This point is illustrated well by the observation of H. A. Ashford and D. M. Risinger, "Presumptions, Assumptions, and Due Process: a Theoretical Overview" (1969) 79 Yale L.J. 165 at p. 172, that if "the defendant must produce some evidence of insanity in order to get the question of insanity before the jury, but the prosecution has the burden of persuading the jury that the defendant is sane, then the issue of insanity is governed by a *presumption* and there is a *presumption of sanity".*

9 Healy, *op. cit., supra* n. 6 at p. 99.

10 Support for this view can be found in J. B. Thayer, "The Burden of Proof" (1890) 4 Harv. L. R. 45 at p. 64: "There is no rule of legal reasoning which is more commonly called a presumption of law than this, which, prima facie, attributes sanity to human beings…. The important question in any particular instance is what is the effect and operation of the rule, not what its name is."

11 C. R. Williams, "Placing the Burden of Proof", in E. Campbell and L. Waller (eds.), *Well and Truly Tried* (1982), pp. 271-300 at p. 285.

12 Glanville Williams, "Offences and Defences" (1982) 2 Legal Studies 233 at p. 235. See also E. Colvin, *Principles of Criminal Law* (2nd ed., 1991), p. 287; R. Cross, *The Golden Thread of the English Criminal Law. The Burden of Proof* (1976), p. 13.

13 (1843) 10 Cl. & F. 200 at p. 210.

14 [1957] V.R. 227 at p. 260. See also D. M. Reaugh, "Presumptions and the Burden of Proof" (1942) 36 Illinois L. Rev. 703 at pp. 706-713.

15 See W. J. V. Windeyer, "The Presumption of Sanity and the Burden of Proof of Insanity" (1930) 3 A.L.J. 328 at p. 329. The relationship between the two notions is clear in the observation of North J. in *R. v. Burr* [1969] N.Z.L.R. 736 at p. 743, that "our law proceeds on the basis that everyone is presumed to be sane until the contrary is shown and accordingly a man is presumed to intend the natural and probable consequences of his acts". *Cf. Hawkins v. The Queen* (1994) 68 A.L.J.R. 572.

16 See O. Dixon, "A Legacy of Hadfield, M'Naghten and Maclean" (1957) 31 A.L.J. 255 at p. 256.

17 [1935] A.C. 462.

18 See *Jayasena v. The Queen* [1971] A.C. 618 at p. 623 *per* Lord Diplock.

19 W. M. Best, *The Principles of the Law of Evidence* (6th ed., 1875), p. 548.

20 G. P. Fletcher, *Rethinking Criminal Law* (1978), p. 519 *et seq.*; G. P. Fletcher, "Two Kinds of Legal Rules: a Comparative Study of Burden-of-Persuasion Practices in Criminal Cases" (1968) 77 Yale L.J. 880 at pp. 899-901.

21 J. V. Barry, "Insanity in the Criminal Law in Australia" (1943) 21 Can. Bar Rev. 429 at p. 437. See also J. V. Barry, "The Defence of Insanity and the Burden of Proof" (1939) 2 Res Judicata 42 at p. 45.

22 *Jayasena v. The Queen* [1970] A.C. 618 at p. 625.

23 *ibid.*

24 Williams, *op. cit., supra,* n. 11 at p. 235.

25 A. Stein, "From Blackstone to *Woolmington:* On the Development of a Legal Doctrine" (1993) 14 *Legal History* 14 at p. 16.

26 [1935] A.C. 462 at p. 481.

27 *ibid.* at pp. 475-476 (citations omitted). See J. C. Smith, "The Presumption of Innocence" (1987) 38 N.I.L.Q. 223 at p. 226.

28 See *Youssef* (1990) 50 A. Crim. R. 1 at p. 10 *per* Hunt J.: "Viscount Sankey did not explain why the onus of proof in relation to this particular state of mind [insanity] should be any different to that in relation to every other state of mind involved in an offence."

29 See *Chan Kau v. The Queen* [1955] A.C. 206 at p. 211 *per* Lord Tucker: "in cases where the evidence discloses a possible defence of self-defence the onus remains throughout on the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from insanity". See also *Mancini v. D.P.P.* [1942] A.C. 3 at p. 11 *per* Viscount Simon L.C.

30 Fletcher, "Two Kinds of Legal Rules", *supra,* n. 20 at p. 918.

31 N. Bridge, "Presumptions and Burdens" (1949) 12 M.L.R. 273 at p. 287.

32 G. H. L.Fridman, "The Onus of Proof in Cases of Murder" [1959] Crim.L.Rev. 557 at p. 560.

33 (1848) 3 C. and K. 183 at p. 188.

34 See, *e.g. Clark v. The King* (1921) 59 D.L.R. 121 at pp. 121-126 *per* Idington J. (dissenting); *The King v. Keirstead* (1918) 42 D.L.R. 193; *R. v. Anderson* (1914) 16 D.L.R. 203 at pp. 208-211 *per* Harvey C.J. (dissenting); *R. v. Jefferson* (1908) 72 J.P. 467; and, more generally, Anon., "The Quantum of Proof of Insanity in Criminal Proceedings" (1943) 5 J. Crim.L. 254; H. Weihofen, *Insanity as a Defense in Criminal Law* (1933), pp. 149, 151-154. In *People v. Fennell (No. 1)* [1940] I.R. 445 the Irish Court of Criminal Appeal upheld a judicial direction to the effect that "the defence should satisfy the jury beyond reasonable doubt that the accused was insane at the time the act was committed". This decision is clearly based on a mistaken reading of *Sodeman v. R.* [1935] A.C. 462 and is inconsistent with the earlier decision in *Att.-Gen. v. Boylan* [1937] I.R. 449. *Fennell* appears effectively to have been ignored in Ireland. See *The People v. O'Mahony* [1985] I.R. 517 at p. 522 *per* Finlay C.J., where reference is made to insanity being established "as a matter of probability". In *Leland v. Oregon* 343 U.S. 790 (1952) the US Supreme Court upheld the constitutionality of a state law which required a defendant to prove insanity beyond a reasonable doubt. In *Rivera v. Delaware* 429 U.S. 877 (1976) a majority turned down the opportunity to reconsider this decision.

35 And in some pre-*Woolmington* decisions. See, *e.g. Clark v. The King* (1921) 59 D.L.R. 121; *R. v. Anderson* (1914) 16 D.L.R. 203.

36 [1970] A.C. 913 at p. 921. This comment was not made in the context of insanity, but is equally applicable to it.

37 *R. v. Carr-Briant* [1943] 1 K.B. 607 at p. 612 *per* Humphreys J. See also *Sodeman v. The King* (1936) 55 C.L.R. 192 at p. 201 *per* Latham C.J. This principle is not confined to insanity: it is applicable in any instance where a persuasive burden of proof is cast upon the accused. See *R. v. Carr-Briant, supra; R. v. Patterson* [1962] 1 All E.R. 340.

38 [1959] V.R. 105 at p. 111.

39 *The King v. Porter* (1933) 55 C.L.R. 182 at p. 191 *per* Dixon J.

40 [1984] 1 W.L.R. 1031 at p. 1036. A similar statement is made by F. McAuley, *Insanity, Psychiatry and Criminal Responsibility* (1993), p. 95: "Naturally the prosecution is required … to disprove [insanity] beyond all reasonable doubt where it has been introduced by the defence and proved on the balance of probabilities." This account of the law cannot be right. If the accused succeeds in proving insanity to the requisite degree he or she is entitled to a verdict on that basis. The citation of *Woolmington* as an authority in n. 13 is quite perplexing.

41 R. F. Carter, *Criminal Law of Queensland* (8th ed., 1992), p. 2211.

42 See I. D. Elliott, "Automatism and Trial by Jury" (1967) 6 Melbourne U.L.R. 53 at p. 65, n. 56. Both errors stem from the misconceived idea that the legal burden "shifts" during the course of a trial. The question of whether the legal burden has been discharged can only be answered in practical terms at the conclusion of the trial. Although the "tactical" onus on the parties will shift according to the course of the evidence, the legal burden remains fixed throughout. Similarly, Williams, *supra,* n. 11, at p. 274.

43 *Doe d. Devine v. Wilson* (1855) 10 Moo. P.C. 502 at p. 531 *per* Patteson J.

44 L. Waller, "McNaughton in the Antipodes", in D. J. West and A. Walk (eds.), *Daniel McNaughton: His Trial and the Aftermath* (1977), pp. 170-185 at p. 177. See also P. Clyne, *Guilty but Insane: Anglo-American Attitudes to Insanity and Criminal Guilt* (1973), p. 42.

45 (1960) 105 C.L.R. 659 at p. 664.

46 *ibid.* See also *R. v. Gibbons* (1947) 86 C.C.C. 20.

47 (1936) 55 C.L.R. 192. See J. V. Barry, "The Sodeman Case and the Defence of Insanity" (1936) 10 A.L.J. 3.

48 (1936) 55 C.L.R. at p. 220.

49 The Privy Council shared this latter view: [1935] A.C. 462.

50 Criminal Law Revision Committee, *Eleventh Report, Evidence (General)* (1972) Cmnd. 4991, p. 81. See also P. Devlin, "Responsibility and Punishment" [1954] Crim.L.Rev. 661 at pp. 675-676.

51 (1919) 14 Cr.App.R. 48 at pp. 54-55.

52 E. Colvin, "Exculpatory Defences in Criminal Law" (1990) 10 O.J.L.S. 381.

53 This question has been asked many times. See, *e.g., Youssef* (1990) 50 A. Crim. R. 1 at p. 9 *per* Hunt J.; N. Morris and C. Howard, *Studies in Criminal Law* (1964), pp. 57-58; Dixon, *op. cit. supra,* n. 16 at p. 256; *Clark v. The King* (1921) 59 D.L.R. 121 at p. 131 *per* Duff J.

54 G. Williams, *Criminal Law: The General Part* (2nd ed., 1961), p. 886. The argument is developed in full at pp. 516-521 of this work. See also *Grace v. Hopper* 217 S.E. 2d 267 at p. 275 (1975) *per* Ingram J. (dissenting): "one cannot have insufficient mental incapacity to distinguish between right and wrong but nevertheless posses sufficient mental capacity to form a criminal intent".

55 See, *e.g.* J. C. Smith and B. Hogan, *Criminal Law* (7th ed., 1992), p. 205.

56 C. Wells, "Whither Insanity?" [1983] Crim.L.R. 787 at p. 795. Indirect support for this interpretation can be found in the following observation of Dickson J. in *R. v. Abbey* (1982) 138 D.L.R. (3d) 202 at p. 211: "the requirement that the accused be able to perceive the consequences of a physical act is a restatement, specific to the defence of insanity, of the principle of *mens rea,* or intention as to the consequences of an act, as a requisite element in the commission of a crime". This suggests that the relationship between insanity and a crime which does not require intention as to consequences may be somewhat different. See also S. H. Kadish, "The Decline of Innocence" [1968] C.L.J. 273 at p. 280.

57 421 U.S. 684 at p. 706 (1975), speaking also for Burger C.J. See also *Commonwealth v. Vogel* 268 A. 2d 89 (1970).

58 T. H. Jones and M. G. A. Christie, *Criminal Law* (1992), p. 45.

59 Wells, *op. cit. supra,* n. 56 at p. 794. See, more generally, H. Fingarette, *The Meaning of Criminal Insanity* (1972), pp. 131-142.

60 *Pace R. v. Pantelic* (1973) 21 F.L.R. 253 at pp. 257-258 *per* Fox J. Contrary to the assertion in this judgment, the burden in relation to *mens rea* does shift to the accused where there is evidence which goes to insanity.

61 See, *e.g., R. v. Chaulk* [1990] 3 S.C.R. 1303; *R. v. S.* [1979] 2 N.S.W.L.R. 1.

62 [1958] N.Z.L.R. 999 at pp. 1007-1008.

63 *R. v. Oxford* (1840) 9 C. and P. 525 at p. 543 *per* Lord Denman C.J.

64 [1983] W.A.R. 184 at p. 188.

65 *ibid.* Similarly, *Ross v. H.M. Advocate* 1991 S.L.T. 564 at p. 575 *per* Lord McCluskey: "It is only if there is *evidence which would otherwise warrant a conclusion that mens rea had been proved beyond reasonable doubt* that a jury would be entitled, if satisfied on a balance of probabilities that the … defence of insanity was made out, to acquit the accused on the ground of his insanity at the time of doing the (criminal) act" (emphasis added).

66 [1976] 2 N.Z.L.R. 644 at p. 649.

67 *ibid.,* at p. 648 *per* Woodhouse J.

68 This paragraph owes a debt to the Law Reform Commission of Victoria's Report No. 34, *Mental Malfunction and Criminal Responsibility* (1990), pp. 20-21.

69 See *R. v. Stones* (1956) 56 S.R. (N.S.W.) 25 at p. 30 *per* Street C.J., Roper C.J. and Herron J.: "it is … for the accused to prove, … in a defence of insanity, that he lacked such an intent". This is also the case where the accused raises the issue of voluntary intoxication in relation to a crime of basic intent. In this situation also the prosecution need not prove *mens rea.* See *D.P.P. v. Majewski* [1977] A.C. 443, where it was made clear that for a crime of basic intent evidence of intoxication is irrelevant, even if the accused was incapable of understanding what he or she was doing or of controlling his or her actions. *Cf. Daviault v. The Queen* (1995) 118 D.L.R. (4th) 469.

70 D. O'Connor and P. Fairall, *Criminal Defences* (1988), p. 244.

71 [1979] 2 N.S.W.L.R. 1 at p. 61 (citation omitted). Similarly, *R. v. Wright* (1979) 48 C.C.C. (2d) 334 at pp. 344-345 *per* Prowse J.A.

72 Courts have a range of orders from which to choose upon a finding of not guilty by reason of insanity. See Criminal Procedure (Insanity) Act 1964, s.5, as substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s.3. A hospitalisation order remains compulsory where the special verdict is returned in respect of an offence for which there is a fixed sentence (murder, most significantly).

73 There are a number of Canadian authorities which suggest that evidence falling short of insanity is admissible on the issue of specific intent in murder. See, *e.g. R. v. Allard* (1990) 57 C.C.C. (3d) 397; *R. v. Lechasseur* (1977) 38 C.C.C. (2d) 319; *R. v. Baltzer* (1974) 27 C.C.C. (2d) 118. The limitation to this approach is that described by Lamer C.J. in *R. v. Chaulk* [1990] 3 S.C.R. 1303 at p. 1326: "it is only when the trier of fact has rejected the defence of insanity that it may consider the evidence of [the accused's] mental condition solely with respect to *mens rea*; this, in turn has only been allowed in cases where an accused is seeking to deny … the specific intent for murder, and to instead to be found guilty of a lesser included offence (*i.e.* … manslaughter)". This method has been adopted by the High Court of Australia in *Hawkins v. The Queen* (1994) 68 A.L.J.R. 572. *Cf. Fisher v. United States* 328 U.S. 463 (1945).

74 Morris and Howard, *op. cit., supra,* n.53 at pp. 75-76.

75 See, *e.g.,* Glanville Williams, *Textbook of Criminal Law* (2nd ed., 1983), p. 645.

76 *Davis v. United States* 160 U.S. 469 at p. 487 (1895) *per* Harlan J.

77 [1990] 3 S.C.R. 1303 at p. 1332. See also *ibid.* at p. 1337; and *R. v. Whyte* [1988] 2 S.C.R. 3 at p. 18 *per* Dickson C.J.: "If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused." See, generally, I. Weiser, "The Presumption of Innocence in Section 11(*d*) of the Charter and Persuasive and Evidential Burdens" (1989) 31 Crim.L.Q. 318; R. Mahoney, "The Presumption of Innocence: A New Era" (1988) 67 Can. Bar Rev. 1.

78 s.16(4). The relevant provision is now s.16(2).

79 [1990] 3 S.C.R. at p. 1330.

80 *ibid.* at p. 1371.

81 *ibid.* at p. 1395; an opinion repeated in *R. v. Romeo* (1991) 62 C.C.C. (3d) 1 at p. 8. See also *R. v. Godfrey* (1984) 8 D.L.R. (4th) 122 at p. 128 *per* Philip J.A.

82 A.W. Mewett, "Insanity, Criminal Law, and the Charter" (1989) 31 Crim.L.Q. 241; adopted by McLachlin J., [1990] 3 S.C.R. at p. 1395.

83 [1990] 3 S.C.R. at p. 1404.

84 *ibid.* at p. 1330.

85 *ibid.*

86 *ibid.* at pp. 1326-1327.

87 Application No. 15923/89 against the United Kingdom, decided on April 4, 1990.

88 *ibid.* at p. 3.

89 *ibid.*

90 *ibid.*

91 W. M. Best, *The Principles of the Law of Evidence* (12th ed., 1922, by S. L. Phipson), p. 368. *Cf. Clark v. The King* (1921) 59 D.L.R. 121 at p. 137 *per* Mignault J.: "It is unquestionable that guilt must be proved beyond a reasonable doubt, so that the presumption of innocence is stronger, and rightly so, than the presumption of sanity."

92 This approach was also taken in *R. v. Romeo* (1991) 62 C.C.C. (3d) 1. See generally, D. Stuart, "Will Section 1 Now Save Any Charter Violation? The Chaulk Effectiveness Test is Improper" (1991) 2 C.R. (4th) 107.

93 [1990] 3 S.C.R. 1303 at pp. 1337-1345.

94 S. E. Sundby, "The Reasonable Doubt Rule and the Meeting of Innocence" (1989) 40 Hastings L.J. 457 at p. 500. See also *Ortwein v. Commonwealth* 76 Pa. 414 at p. 425 (1874): "Merely doubtful evidence of insanity would fill the land with acquitted criminals."

95 See, further, text accompanying n. 127, *infra.*

96 See, *e.g.,* the observations of Davis A.J.A. in *R. v. Kaukakani* 1947 (2) S.A. 807 at p. 814. In *R. v. Lipman* [1970] 1 Q.B. 152 it was held that if the accused produces evidence that he could not have formed a specific intent because of voluntary intoxication, the prosecution must disprove the contention beyond reasonable doubt.

97 Fletcher, "Two Kinds of Legal Rules", *supra,* n. 20 at p. 908.

98 [1990] 3 S.C.R. 1303 at p. 1342.

99 Criminal Procedure (Insanity) Act 1964, s.5, as substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991, s.3(2)(*a*). Under Canadian law there was no alternative to automatic, indefinite commitment. This was held unconstitutional in *R. v. Swain* (1991) 63 C.C.C. (3d) 481; there now exists a range of possible disposal arrangements. See, generally, A. J. C. O'Marra, "Hadfield to Swain: the Criminal Code Amendments Dealing with the Mentally Disordered Accused" (1994) 36 Crim.L.Q. 49.

100 Healy, *supra,* n. 6 at p. 106. See also Fletcher, "The Two Kinds of Legal Rules", *supra,* n. 20 at p. 930: "It is not clear why one should fear the wisdom of jurymen to cope with unfounded claims of insanity …; but if fear there be, the burden of going forward provides a sufficient check against acquitting the guilty" [footnote omitted].

101 [1990] 3 S.C.R. 1303 at p. 1375.

102 *ibid.,* at p. 1390. The phrase quoted is from the judgment of Lamer J. in *Irwin Toy Ltd v. Quebec (Attorney General)* [1989] 1 S.C.R. 927 at p. 994.

103 [1990] 3 S.C.R. at p. 1372.

104 *ibid.* at pp. 1392-1393.

105 *ibid.* at p. 1405.

106 See, *e.g., Williamson v. Ah On* (1926) 39 C.L.R. 95 at p. 113 *per* Isaacs J.

107 (1984) 8 D.L.R. (4th) 122 at p. 135.

108 319 U.S. 463 at p. 469 (1943).

109 B. D. Underwood, "Burdens of Persuasion in Criminal Cases" (1977) 86 Yale L.J. 1299 at pp. 1334-1335.

110 J. C. Jeffries and P. B. Stephan, "Defenses, Presumptions, and Burden of Proof in Criminal Law" (1979) 88 Yale L.J. 1325 at p. 1335.

111 [1961] 2 Q.B. 205 at p. 212. The contrary observation of Lord Goddard C.J., in *Hill v. Baxter* [1958] 1 Q.B. 277 at p. 282, is not good law: "it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it".

112 A. Stein, "Criminal Defences and the Burden of Proof" (1991) 28 Coexistence 133 at p. 137.

113 *ibid.* at p. 141.

114 H.L.A. Hart, *Punishment and Responsibility* (1st ed., 1968), p. 13.

115 *ibid.* at pp. 13-14.

116 Stein, *op. cit., supra,* n. 112 at p. 138.

117 *ibid.* at p. 139. See also P. H. Robinson, "Criminal Law Defenses: a Systematic Analysis" (1982) 82 Columbia L.Rev. 199 at pp. 257-258: "One might argue that it is particularly appropriate that the defendant carry the burden of persuasion on a defense which seeks exculpation while admitting the harm or evil of the offense."

118 *Loc. cit.*

119 Fletcher, "Two Kinds of Legal Rules", *supra,* n. 20 at p. 887.

120 Colvin, *supra,* n. 52 at p. 386. See also *ibid.* at pp. 406-407.

121 *ibid.* at pp. 386-387. Similarly, Jones and Christie, *op. cit., supra,* n. 58 at p. 137.

122 Robinson, *supra,* n. 117 at p. 229.

123 The same point is raised by Hart's definition of an excuse. See the quotation accompanying n. 115, *supra,* which Stein himself cites (*supra,* n. 112 at p. 138).

124 Colvin, *supra,* n. 52 at p. 393.

125 For a suggestion to this effect, see the unpublished Law Commission paper, "The Burden of Proof in Duress as a Defence to Criminal Offences" (1993). The Commission has not pursued its "provisional conclusion … that the defendant should bear the persuasive burden of proving that defence, on a balance of probabilities" (para 1.1).

126 Law Reform Commission of Victoria, *supra,* n. 68 at p. 63. Hart, *op. cit., supra,* n. 114 at p. 92, referred to the absence of the "minimum link between mind and body, indispensable for any form of criminal responsibility".

127 [1958] N.Z.L.R. 999 at p. 1026. The supporting cases are too numerous to mention. See *e.g. Ross v. H.M. Advocate* 1991 S.L.T. 564; *The Queen v. Falconer* (1990) 171 C.L.R. 30; *Youssef* (1990) 50 A.Crim.R. 1; *S v. Hartyani* 1980 (3) S.A. 613; *Bratty v. Att.-Gen: for Northern Ireland* [1963] A.C. 386.

128 This term is used in preference to that of non-insane for the reasons put forward by Thomas J. in *Milloy* (1991) 54 A. Crim. R. 340 at p. 341: "I confess an aversion to the use of the term "noninsane automatism'. It is a barbarism the continuation of which is hardly justified by its historical origin. It is particularly abominable when used (as if frequently is) in a sentence that refers to its being negatived, or worse still, not negatived. Literally thousands of jurors, students, legal practitioners, judges and others will avoid unnecessary headaches if the use of the term is generally discontinued."

129 *R. v. Carter* [1959] V.R. 105 at p. 110 *per* Sholl J. See generally E. Lederman, "Non-Insane and Insane Automatism: Reducing the Significance of a Problematic Distinction" (1985) 34 I.C.L.Q. 819; McAuley, *op. cit., supra,* n. 40 at pp. 73-81.

130 (1967) 121 C.L.R. 205 at p. 215.

131 Similarly, *The Queen v. Falconer* (1990) 171 C.L.R. 30 at pp. 75-76 *per* Toohey J.

132 See N. E. Simmonds, "Bluntness and Bricolage", in H. Gross and R. Harrison (eds.), *Jurisprudence. Cambridge Essays* (1992), Chap. 1.

133 (1977) 37 C.C.C. (2d) 461 at pp. 477-478. The decision of the Supreme Court is reported at (1980) 54 C.C.C. (2d) 1.

134 It is possible, however, for a disease of the mind to be the product of external factors. Examples would include cases of viral meningitis or encephalitis and traumatic brain injury: see *Re Eugene Keen Bromage* (1990) 48 A. Crim. R. 79.

135 R. F. Schopp, *Automatism, Insanity, and the Psychology of Criminal Responsibility. A Philosophical Inquiry* (1991), p. 133.

136 See *R. v. Bingham* [1991] Crim.L.Rev. 433; *R. v. Hennessy* [1989] 1 W.L.R. 287.

137 [1959] V.R. 105 at p. 110.

138 This was recognised in *R. v. Quick* [1973] 1 Q.B. 910.

139 J. E. Hall Williams, "Automatism I. *Woolmington* Triumphant" (1962) 25 M.L.R. 231 at p. 233.

140 Smith and Hogan, *supra* n. 55 at p. 206 (footnote omitted). See also R. Cross, "Reflections on Bratty's Case" (1962) 78 L.Q.R. 236 at p. 241.

141 *R. v. Stripp* (1978) 69 Cr.App.R. 318 at p. 323 *per* Ormrod L.J.

142 *Bratty v. Att.-Gen. for Northern Ireland* [1963] A.C. 386 at p. 413 *per* Lord Denning. See generally Colvin *op. cit., supra,* n. 12 at pp. 281-282.

143 (1990) 171 C.L.R. 30 at p. 40.

144 *ibid.* at p. 83 *per* Gaudron J. But *cf. Hill v. Baxter* [1958] 1 Q.B. 277 at p. 282 *per* Lord Goddard C.J.; *Fulcher v. State* 633 P. 2d 142 (1981); *State v. Caddell* 215 S.E. 2d 348 (1975); and also text accompanying nn. 188-190, *infra.*

145 O'Connor and Fairall, *op. cit., supra,* n. 70 at p. 256.

146 [1958] N.Z.L.R. 999 at pp. 1014-1015. See also *ibid.,* at p. 1019: "Automatism … must … be put to the jury if it has been advanced …, and the jury should be told that it must consider whether upon the evidence it is satisfied that the Crown has discharged its onus of proof and that, if in doubt, it may be its duty to acquit the accused."

147 *State v. Caddell* 215 S.E. 2d 348 at p. 369 (1975) *per* Sharp C.J. (dissenting in part).

148 [1963] A.C. 386 at p. 413 *per* Lord Denning, drawing upon *R. v. Cottle* [1958] N.Z.L.R. 999 at p. 1025. In *Hill v. Baxter* [1958] 1 Q.B. 277 at p. 285, Devlin J. referred to "*prima facie* evidence".

149 [1991] 2 Q.B. 92 at p. 96.

150 [1969] N.Z.L.R. 736 at p. 744. According to Lord Taylor of Gosforth C.J. in *Attorney-General's Reference (No. 2 of 1992)* [1994] Q.B. 91 at p. 105, there must be evidence of a "total destruction" of voluntariness. See also *Milloy* (1991) A. Crim. R. 340 at p. 341 *per* Thomas J.: "It is fundamental to a defence of automatism that the actor has *no* control over his actions"; *Roberts v. Ramsbottom* [1980] 1 W.L.R. 823 at p. 832 *per* Neill J.: "One cannot accept as exculpation anything less than total loss of consciousness."

151 *The Queen v. Falconer* (1990) 171 C.L.R. 30 at p. 61 *per* Deane and Dawson JJ. Similarly, *S. v. Trickett* 1973 (3) S.A. 526 at p. 537 *per* Marais J. (Trengou J. concurring); *R. v. Tsigos* [1964-65] N.S.W.L.R. 1607 at p. 1621 *per* Taylor J.; *Hill v. Baxter* [1958] 1 Q.B. 277 at p. 285 *per* Devlin J. In *Bratty* Lord Denning

indicated the need for "medical evidence which points to the cause of the mental incapacity" ([1963] A.C. 386 at pp. 413-414). This is not an absolute requirement: automatism might be raised on non-medical evidence. Elliott, *op. cit., supra,* n. 42 at p. 56, has suggested: "An accused who was seen to receive a blow on the head, who appeared dazed after the blow and who shortly afterwards did a criminal act would adduce evidence fit for the consideration of the jury though he adduced no specifically medical evidence" (footnote omitted). See, *e.g. R. v. Scott* [1967] V.R. 276; *R. v. Budd* [1962] Crim.L.R. 49; *Ziems v. The Prothonotary of the Supreme Court of New South Wales* (1957) 97 C.L.R. 279 at p. 296 *per* Fullagar J.: "One does not need medical evidence to infer that the blows which he described might well have had a real and direct effect on the appellant's capacity to drive a motor car."

152 (1990) 171 C.L.R. 30 at p. 83. Thus in *R. v. Sullivan* [1984] 1 A.C. 156, for example, the accused put forward expert evidence of the effects of epilepsy and of epileptic automatism.

153 [1968] Crim.L.Rev. 266.

154 *Cooper v. McKenna, ex p. Cooper* [1960] Qd. R. 406 at p. 419 *per* Stable J.

155 [1964-65] N.S.W.L.R. 1607 at p. 1630 (citations omitted). The allusions here are to the judgment of Devlin J. in *Hill v. Baxter* [1958] 1 Q.B. 277.

156 Elliott, *op. cit., supra,* n. 42 at p. 57. This is a distinction which was not recognised in Glanville Williams, "Evidential Burdens on the Defence" (1977) 127 N.L.J. 182 at p. 184.

157 See text accompanying and following n. 71, *supra.*

158 [1963] A.C. 386. See also *R. v. Foy* [1960] Qd. R. 225.

159 [1963] A.C. at p. 418.

160 (1990) 171 C.L.R. 30 at p. 63. See also *Hawkins v. The Queen* (1994) 68 A.L.J.R. 572; *Williams v. The Queen* [1978] Tas.S.R. 98.

161 *R. v. Burgess* [1991] 2 Q.B. 92; *R. v. Sullivan* [1984] A.C. 156. *Cf. R. v. Holmes* [1960] W.A.R. 122, where the possibility of an unconditional acquittal was put before the jury even though the only medical evidence was suggestive of a disease of the mind.

162 [1963] A.C. 386 at p. 403. See also *R. v. Sullivan* [1984] A.C. 156.

163 O'Connor and Fairall, *op. cit., supra,* n. 70 at p. 247; Elliott, *op. cit., supra,* n. 42 at p. 62.

164 [1963] A.C. at p. 390.

165 *The Queen v. Joyce* [1970] S.A.S.R. 184 at p. 194 *per* Bray C.J., Walters and Zelling JJ.

166 [1964-65] N.S.W.L.R. 1607 at p. 1629.

167 See text accompanying and following n. 76, *supra.*

168 Law Reform Commissioner of Tasmania, *Insanity, Intoxication and Automatism,* Report No. 61 (1988), p. 8.

169 See text accompanying nn. 69-74, *supra*; and also Lederman, *op. cit., supra,* n. 129 at pp. 825-828.

170 See *R. v. S.* [1979] 2 N.S.W.L.R. 1 at p. 44 *per* O'Brien J.; and also *Bratty* [1963] A.C. 386 at p. 410 *per* Lord Denning. *Cf.* the discussion within n. 73, *supra.*

171 [1963] A.C. 386 at p. 403, referring to the view of the Court of Appeal.

172 *ibid.*

173 *The Queen v. Falconer* (1990) 171 C.L.R. 30 at p. 62 *per* Deane and Dawson JJ. See also *Radford* (1985) 20 A. Crim. R. 388; *R. v. Wiseman* (1972) 46 A.L.J. 412; *R. v. Holmes* [1960] W.A.R. 122; *R. v. Cottle* [1958] N.Z.L.R. 999.

174 *Milloy* (1991) 54 A. Crim. R. 340 at pp. 341-342 *per* Thomas J.; *Bedelph* (1980) 1 A. Crim. R. 445 at p. 447 *per* Green C.J.

175 See *The Queen v. Falconer* (1990) 171 C.L.R. 30; and generally, S. M. H. Yeo, "Power of Self-Control in Provocation and Automatism" (1992) 14 Sydney L. R. 3 at pp. 14-20; S. M. H. Yeo, "Recent Australian Pronouncements on the Ordinary Person Test in Provocation and Automatism" (1991) 33 Crim.L.Q. 280 at pp. 293-296; Colvin, *op. cit., supra,* n. 12 at pp. 291-294. It remains to be seen how far English law will develop in this regard. See *R. v. T.* [1990] Crim.L.R. 257; *R. v. Hennessy* [1989] 1 W.L.R. 287.

176 (1972) 46 A.L.J. 412.

177 O'Connor and Fairall, *op. cit., supra,* n. 70 at p. 244.

178 (1973) 58 Cr.App.R. 364 at p. 374.

179 *ibid.* at pp. 374-375.

180 (1990) 171 C.L.R. 30 at p. 63 *per* Deane and Dawson JJ.; at p. 77 *per* Toohey J.; at p. 86 *per* Gaudron J.

181 *ibid.* at p. 86 *per* Gaudron J.

182 *ibid.* at p. 77 *per* Toohey J.

183 As Cross, *op. cit., supra,* n. 12 at p. 238, observed: "The mind boggles at the thought of the effect of such a summing up upon the ordinary English jury, and the magnitude of the task of the judge who has to direct them." See also *Youssef* (1990) 50 A. Crim. R. 1 at p. 11 *per* Hunt J.

184 *Loc. cit.* at p. 241. See also *R. v. O'Brien* [1966] 3 C.C.C. 284 at p. 286 *per* Bridges C.J.N.B. An alternative reform would be the formation of a unified defence; see Lederman, *op. cit. supra,* n. 129 at p. 834.

185 See, *e.g.,* Morris and Howard, *op. cit. supra,* n. 53 at p. 78.

186 See H. Gross, *A Theory of Criminal Justice* (1979), p. 67: "The foundation of criminal liability is conduct, for without an act there can be no liability. But not any act will do. There are qualifications that an act must meet, and the first is that it be *voluntary.*"

187 [1963] A.C. 386 at p. 407.

188 (1990) 171 C.L.R. 30.

189 *ibid.* at p. 56.

190 *ibid.*

191 *ibid.* at p. 83.

192 *ibid.* at pp. 83-84.

193 Jeffries and Stephan, *op. cit. supra,* n. 110 at p. 1334.

194 [1990] 3 S.C.R 1303. See text accompanying nn. 98-104, *supra.*

195 Hall Williams, *op. cit. supra,* n. 139, at p. 234.

196 See, *e.g., Att.-Gen.'s Reference (No. 2 of 1992)* [1994] Q.B. 91; *R. v. Frisbee* (1990) 48 C.C.C. (3d) 386; *Broome v. Perkins* [1987] R.T.R. 321; *R. v. Isitt* [1978] R.T.R. 211; *Watmore v. Jenkins* [1962] 2 Q.B. 572; *Hill v. Baxter* [1958] 1 Q.B. 277. English courts do not appear to have considered the argument, made by Sharp C.J. (dissenting) in *State v. Caddell* 215 S.E. 2d 348 at p. 369 (1975), that "ordinarily a defendant's unsupported plea of blackout will aid the prosecution rather than the defence".

197 For a rare counter-example, see *R. v. Sell* [1962] Crim.L.Rev. 463.

198 Underwood, *op. cit. supra,* n. 109 at p. 1335.

199 J. T. McNaughton, "Burden of Production of Evidence: a Function of a Burden of Persuasion" (1955) 68 Harv.L.R. 1382. See *ibid.* at pp. 1390-1391: "Persuasion-or belief, or probability-is the basic ingredient of both burden of production and burden or persuasion."

200 R. B. Dworkin, "Easy Cases, Bad Law, and Burdens of Proof" (1972) 25 Vanderbilt L.R. 1151 at p. 1154.

201 [1952] 2 Q.B. 826 at p. 831.

202 See *R. v. Chaulk* [1990] 3 S.C.R. 1303 at p. 1342 *per* Lamer C.J.; and also *Hopps v. The People* 31 Ill. 385 at p. 389 (1863) *per* Walker J.: "Experience teaches us, that insanity is readily simulated, to the extent of creating a doubt in the minds of those who have no opportunity, by associating with the accused, of detecting the fraud."

203 See *Davis v. United States* 160 U.S. 469 at pp. 492-493 (1895) *per* Harlan J.: "It seems to us that undue stress is placed in some of the cases upon the fact that … the defense of insanity … is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome."

204 *State v. Bartlett* 43 N.H. 224 at p. 228 (1861) *per* Bellows J. Numerous quotations to this effect from decisions in jurisdictions within the United States could be given. More recently the trend has been towards the imposition of some kind of persuasive burden upon the accused. In respect of Federal law, the Comprehensive Crime Control Act of 1984, 18 U.S.C. 20(b) (Supp. 1985), changed the law propounded in *Davis v. United States* 160 U.S. 469 (1895). It placed a burden of proof on the defendant to prove by clear and convincing evidence that he or she was insane. See, generally, R. D. Mackay, "Post-Hinckley Insanity in the U.S.A." [1988] Crim.L.Rev. 88 at p. 93.

205 160 U.S. 469 at p. 488 (1895). See also *German v. United States* 120 F.R. 666 (1903).

206 Cross, *op. cit. supra,* n. 12 at p. 13.

207 160 U.S. at p. 487.

208 Criminal Law Revision Committee, *op. cit. supra,* n. 50 at p. 88. Similarly, Parliament of the Commonwealth of Australia Senate Standing Committee on Constitutional and Legal Affairs, *The Burden of Proof in Criminal Proceedings* (1982). For different conclusions, see *Review of Commonwealth Criminal Law. Final Report* (1991); Legal and Constitutional Committee, *Report to Parliament [Victoria] on the Burden of Proof in Criminal Cases* (1985).

209 Criminal Law Revision Committee, *op. cit. supra,* n. 50 at pp. 88-90.

210 Law Commission, *A Criminal Code for England and Wales,* Law Com. No. 177 (1989).

211 *Report of the Committee on Mentally Abnormal Offenders,* Cmnd. 6244 (1975), pp. 230-231.

212 The same approach has been taken in the amended (by S.C. 1991, c. 43) Canadian *Criminal Code,* s.16. See also Criminal Law Officers Committee of the Standing Committee of Attorneys General, *Draft Model Criminal Code: Chapter 2 General Principles of Criminal Responsibility* (1992) clause 302.2: "A person is presumed not to have been suffering from a mental impairment exempting him or her from criminal responsibility. This presumption is only displaced if it is proved on the balance of probabilities (whether by the prosecution or the defence) that the person was suffering from one."

213 This approach was presaged in *Codification of the Criminal Law. A Report to the Law Commission,* Law Com. No. 143 (1985), Chap. 12. The reasoning seems to have been "that the C.L.R.C. was concerned only with the burden of proof, whereas Butler proposed a complete restatement of the law of mental disorder, of which the allocation of the burden of proof was an integral part" (Sir John Smith, Q.C., letter to author, May 29, 1994).

214 R. W. Harding, "Sane and Insane Automatism in Australia: Some Dilemmas, Developments and Suggested Reforms" (1981) 4 Int. J. Law and Psychiatry 73 at p. 76, n. 20. For a favourable view of the burden of proof proposals in the Butler Report, see E. Griew, "Let's Implement Butler on Mental Disorder and Crime" [1984] C.L.P. 47 at pp. 58-60.

215 Fletcher, *Rethinking Criminal Law, supra,* n. 20 at pp. 532-541.

216 31 Ill. 385 at p. 393 (1863).

217 See *R. v. Whyte* [1988] 2 S.C.R. 3 at p. 18 *per* Dickson C.J. (quoted within n. 77, *supra*). The particular value of the decision of the Canadian Supreme Court in *R. v. Chaulk* [1990] 3 S.C.R. 1303 is that it has made explicit the conflict between the presumptions of innocence and sanity. See also *R. v. Swain* (1991) 63 C.C.C. (3d) 481; and, more generally, R. Cairns Way, "The Impact of the Charter on the Administration of Criminal Justice in Canada: Rhetoric or Revolution?" in J. Chan and Y. Ghai (eds), *The Hong Kong Bill of Rights: a Comparative Approach* (1993), Chap. 15, pp. 367-370.

218 *Woolmingtom v. D.P.P.* [1935] A.C. 462.

219 See text accompanying n. 69, *supra.* An additional point is that the insanity defence as currently applied can lead to punishment in the absence of *mens rea.* See R. Martin, *A System of Rights* (1993), p. 276. See, further, text accompanying n. 239, *infra*; and also *Youssef* (1990) 50 A. Crim. R. 1 at p. 11 *per* Hunt J.: "The jury, the judge will say, must proceed by reference to the presumption that the accused was sane and that he knew what he was doing, until he proves to the contrary …. That direction seems to me … to be just as dangerous as one that an accused is presumed to have intended the natural consequences of his acts …" A direction of this latter type is, of course, precluded by s.8 of the Criminal Justice Act 1967 and was disapproved by the Privy Council in *Frankland and Moore v. R.* [1987] A.C. 576.

220 Elliott, *supra,* n. 42 at p. 69.

221 A. J. Ashworth, *Principles of Criminal Law* (1991), p. 182; Wells, *supra,* n. 56 at p. 787.

222 *R. v. Sullivan* [1984] A.C. 156 at p. 172.

223 See Simmonds, *supra,* n. 132 at p. 18: "It seems to me that legal rules very often stand in this blunt and oblique relationship to the values that they serve. Indeed it is often unclear precisely which values the rules *do* serve, for they may frequently be suggestive of distinct moral visions which may even be incompatible."

224 Committee on Insanity and Crime, *Report,* Cmnd. 2005 (1923), p. 7.

225 S. Saltzburg, "Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices" (1983) 20 American Crim.L.Rev. 393 at p. 409. See also Robinson, *op. cit. supra,* n. 117 at p. 246.

226 Martin, *op. cit. supra,* n. 219 at p. 269.

227 *ibid.* For the reasons alluded to earlier, Martin's description of insanity as an excuse is problematic. See the quotation accompanying n. 124, *supra.*

228 Sundby, *op. cit. supra,* n. 94 at p. 492. See generally Fingarette, *op. cit. supra,* n. 59 at pp. 131-135; J. Feinberg, *Doing and Deserving. Essays in Criminal Responsibility* (1970), Chap. 11; Hart, *op. cit. supra,* n. 114 at p. 176. Compare the argument that the correct verdict is "the accused committed the act or omission but is not criminally responsible by reason of mental impairment"; see Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *supra,* n. 212 at p. 35, where this proposal is disapproved.

229 Stein, *op. cit. supra,* n. 112 at p. 137.

230 More generally, as C. M. V. Clarkson and H. M. Keating, *Criminal Law: Text and Materials* (3rd ed., 1994), p. 355, have pointed out: "The difficulty lies in determining where the line between sanity and responsibility on the one hand, and insanity and irresponsibility on the other hand, is to be drawn. It has been increasingly argued that absolute states of sanity and insanity rarely (if ever) exist; instead there

are shades of insanity." See also *Fisher v. United States* 328 U.S. 463 at p. 492 (1945) *per* Murphy J. (dissenting): "There is no absolute or clear-cut dichotomous division of the inhabitants of this world into the sane and the insane."

231 See text within n. 72, *supra.*

232 It is doubtful whether the "clumsy and complex" (Hart, *op. cit. supra,* n. 114 at p. 253) external/internal factor test employed by the courts is effective in this regard. Similarly, Clarkson and Keating, *op. cit. supra,* n. 230 at pp. 365-366.

233 J. N. Eule, "The Presumption of Sanity: Bursting the Bubble" (1978) 25 U.C.L.A.L.R. 637 at p. 669. See also J. Goldstein and J.Katz, "Abolish the "Insanity Defence'--Why Not?" (1963) 72 Yale L.J. 853 at p. 865.

234 [1990] 3 S.C.R. 1303 at p. 1392.

235 Similarly, G. Ferguson, "A Critique of Proposals to Reform the Insanity Defence" (1989) 14 Queen's L.J. 147 at pp. 148-149: "An insanity verdict is a judgment that the accused is not morally deserving of punishment. Whether he or she should be locked up for society's protection, and what the burden of proof should be on this issue of preventative detention is, and ought to be, an entirely separate issue."

236 Fletcher, "Two Kinds of Legal Rules", *supra,* n. 20 at p. 921.

237 *Cf.* the text within n. 73, *supra.* It takes some imagination to think of counter-examples. See *R. v. Wright* (1979) 48 C.C.C. (2d) 334 at p. 346 *per* Prowse J.A.: "if a defence of insanity failed, evidence of brain injury that affected the accused's eyesight would be relevant on the issue of whether the accused had the requisite intent or believed he was shooting a moose".

238 Similarly, Kadish, *op. cit. supra,* n. 56 at p. 280.

239 Martin, *op. cit. supra,* n. 219 at p. 272. See also the quotation accompanying n. 124, *supra;* R. A. Duff, *Trials and Punishment* (1986), p. 37.

240 Similarly, Law Reform Commission of Canada, *Mental Disorder in the Criminal Process,* Report No. 10 (1976), p. 22. (The Commission later resiled from this position. For discussion of Canadian reform proposals, see Ferguson, *op. cit. supra,* n. 235.)

241 The Law Commission, *supra,* n. 210, Vol. 2, p. 225, observed, in the context of its proposal that the prosecution should be permitted to prove insanity on the balance of probabilities: "there is an obvious argument for requiring proof beyond reasonable doubt of the case for exposing him, through a mental disorder verdict, to the disposal powers of the court". Regrettably the Law Commission failed to perceive the wider implications of its comment. Similar thinking can be found in the occasional argument that the presumption of sanity can be a protection to an accused against a too easy finding of insanity. See, *e.g.* Law Reform Commission of Victoria, *supra,* n. 68 at p. 23: "In order to justify indefinite detention, there ought to be more than a reasonable doubt about the defendant's sanity"; *R. v. Ayoub* (1984) 10 A. Crim. R. 312 at p. 321 *per* Enderby J. (dissenting); Elliott, *supra,* n. 42 at pp. 75-6. Where the prosecution argues under s.6 of the Criminal Procedure (Insanity) Act 1964 for a verdict of not guilty by reason of insanity instead of the defence of diminished responsibility sought by the accused (or the converse), it must do so beyond reasonable doubt. See *R. v. Grant* [1960] Crim.L.Rev. 424; *cf. R. v. Ayoub, supra.*

242 See *Jones v. United States* 463 U.S. 354 (1983).

243 See the text within n. 72, *supra.*

